



1974

## Federal Jurisdiction and Procedure

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### Recommended Citation

Various Editors, *Federal Jurisdiction and Procedure*, 20 Vill. L. Rev. 520 (1974).

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## Federal Jurisdiction and Procedure

FEDERAL CIVIL PROCEDURE — VENUE — SECTION 1391(c)  
APPLIES SOLELY TO CORPORATE DEFENDANTS AND DOES NOT GENERALLY REDEFINE THE TRADITIONAL CONCEPT OF CORPORATE RESIDENCE FOR VENUE PURPOSES.

*American Cyanamid Co. v. Hammond Lead Products, Inc.* (1974)

American Cyanamid Co. (Cyanamid), a Maine corporation, brought this diversity action in the United States District Court for the District of New Jersey, the judicial district in which it maintained its principal offices and was doing business, against Hammond Lead Products, Inc., an Indiana corporation, and Mitchener, an Indiana resident.<sup>1</sup>

Filing a motion pursuant to rule 12(b)(3),<sup>2</sup> the defendants argued that the complaint should have been dismissed for improper venue under the general venue provisions of section 1391(a).<sup>3</sup> The district court denied the motion but authorized an interlocutory appeal to determine the propriety of the denial.<sup>4</sup> On appeal, the plaintiff argued that corporate venue provision, section 1391(c),<sup>5</sup> was a general redefinition of corporate residence for venue purposes which had revised the traditional concept that a corporation only resided in the place of incorporation.<sup>6</sup> As a result of section 1391(c), the plaintiff reasoned, New Jersey was a proper forum for trial under section 1391(a).<sup>7</sup> Disagreeing with the plaintiff, the Third Circuit Court of Appeals reversed the district court's order and remanded

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1. *American Cyanamid Co. v. Hammond Lead Prods., Inc.*, 495 F.2d 1183 (3d Cir. 1974). Cyanamid alleged that Hammond Lead Products and Mitchener had engaged in unfair competition in that Mitchener, a former employee, had breached his fiduciary and contractual duty by divulging, *inter alia*, Cyanamid's production secrets to Hammond Lead Products, his new employer. The complaint demanded injunctive and compensatory relief for the alleged acts. *Id.* at 1184.

2. FED. R. CIV. P. 12(b)(3).

3. 495 F.2d at 1184. Section 1391(a) provides:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

28 U.S.C. § 1391(a) (1970).

4. 495 F.2d at 1184. The appeal was made pursuant to federal statute. *See* 28 U.S.C. § 1292(b) (1970).

5. For the text of section 1391(c), *see* text accompanying note 14 *infra*.

6. 495 F.2d at 1185.

7. *Id.*

with instructions to dismiss the complaint,<sup>8</sup> holding that section 1391(c) redefined only the residence of corporate defendants for venue purposes.<sup>9</sup> *American Cyanamid Co. v. Hammond Lead Products, Inc.*, 495 F.2d 1183 (3d Cir. 1974).

In 1948, Congress attempted to remedy previous difficulties with corporate venue<sup>10</sup> in the federal courts by revising the venue laws.<sup>11</sup> The revision produced a new general venue statute, section 1391(a),<sup>12</sup> which continued the use of residence as a foundation for venue in diversity actions;<sup>13</sup> and also a statute relating to corporate venue, section 1391(c), which read:

A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.<sup>14</sup>

8. *Id.* at 1187.

9. *Id.*

10. These difficulties stemmed from the traditional concept, established by the Supreme Court of the United States in a long line of cases, that corporate residence for venue purposes was restricted to the state of incorporation. *See, e.g., Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163 (1948); *Shaw v. Quincy Mining Co.*, 145 U.S. 444 (1892). This idea was based upon the theory that corporations were nonmigratory. That is, although corporate activities could expand to many jurisdictions, theoretically, the corporation had to "dwell in the place of its creation." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839).

As modern corporations evolved, the rule of nonmigration greatly restricted the number of diversity actions brought against corporations in the federal courts. Although state legislatures passed laws in order to subject corporations to the jurisdiction of local courts, federal venue law was not similarly revised. As a result, corporations were often insulated from suit in the federal courts in the states where they incurred liabilities. *See* 1 J. MOORE, *FEDERAL PRACTICE* ¶ 0.142, at 1491 (2d rev. ed. 1974).

In 1939, the Supreme Court circumvented this venue problem by holding that a corporation waived any objection to improper venue in the federal courts of any state where, as a prerequisite to gaining a license to do business, it appointed an agent for the service of process. *Neirbo Co. v. Bethlehem Shipbldg. Corp.*, 308 U.S. 165 (1939). *See* Comment, *The Corporate Plaintiff and Venue Under Section 1391(c) of the Judicial Code*, 28 U. CHI. L. REV. 112, 115 (1960). However, under *Neirbo*, the corporation still did not become a resident of the licensing state. *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163, 167-68 (1948).

11. For the legislative history of the 1948 revision, *see Hearings on H.R. 1600 and 2055 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 29 (1947); H.R. REP. No. 308, 80th Cong., 1st Sess. 6, A127-33 (1947).

12. 28 U.S.C. § 1391(a) (1970). For the present text of this statute, *see* note 3 *supra*. As originally enacted, in 1948, section 1391(a) did not include the venue option "where the claim arose," which was added by Act of November 2, 1966, Pub. L. No. 89-714, § 1, 80 Stat. 1111, amending 28 U.S.C. § 1391(a) (1964).

13. The predecessor to section 1391(a) had provided for venue where one defendant resided and where another could be found. Judicial Code of 1911, ch. 231, § 50, 36 Stat. 1101. In contrast, section 1391(a) required that all defendants (or all plaintiffs) be residents of the judicial district in which suit was filed. *See* note 3 *supra*.

14. 28 U.S.C. § 1391(c) (1970). The statute has never been amended.

This section's first clause merely stated those judicial districts where a corporation could be sued, but the nebulous language of its second clause — "and such judicial district shall be regarded as the residence of such corporation for venue purposes"<sup>15</sup> — caused a problem of interpretation<sup>16</sup> because it was unclear whether Congress had intended to redefine the traditional concept which restricted corporate residence for venue purposes<sup>17</sup> to the place of incorporation, so that a corporation might sue or be sued in any of the districts enumerated in the first clause.

The first federal court to consider the question decided that section 1391(c) offered an expanded definition of corporate residence which applied to a corporation as either plaintiff or defendant.<sup>18</sup> Other district judges agreed, reasoning that the first clause covered defendant corporations, and thus, the second clause would be redundant unless it referred to plaintiff corporations.<sup>19</sup> However, other district courts interpreted section 1391(c) differently, reasoning that Congress would have used more precise language if it had intended to overrule completely the traditional concept which restricted corporate residence to the place of incorporation.<sup>20</sup>

15. *Id.* For the full text of section 1391(c), see text accompanying note 14 *supra*.

16. Soon after the revision was proposed, one commentator wrote that the statute would effectively amend the traditional concept of corporate residence for venue purposes. See Note, *The Proposed Revision of the Federal Judicial Code*, 60 HARV. L. REV. 424, 435 (1947). Apparently, this author did not foresee the interpretive problem caused by the phrase "such corporation" in the second clause. See text accompanying notes 40-43 *infra*.

17. Generally, when a statute is ambiguous, congressional intent can be ascertained from an examination of its legislative history. Unfortunately, the legislative record of section 1391(c) contains no direct reference to the statutory language, and thus the interpretation problem was exacerbated. See Comment, *supra* note 10, at 116.

18. *Freiday v. Cowdin*, 83 F. Supp. 516 (S.D.N.Y.), *appeal dismissed*, 177 F.2d 1020 (2d Cir. 1949).

19. *E.g.*, *A.P. Green Refractories Co. v. Peerless Boiler & Eng'r Co.*, 303 F. Supp. 275 (E.D. Mo. 1969); *Hadden v. Barrow, Wade, Guthrie & Co.*, 105 F. Supp. 530 (N.D. Ohio 1952). *Cf.* *Southern Paperbd. Corp. v. United States*, 127 F. Supp. 649 (S.D.N.Y. 1955).

In *Southern Paperboard*, the court considered the application of section 1391(c) to actions concerning the recovery of taxes under section 1402(a), which required that venue be laid in the residence of the plaintiff. 28 U.S.C. § 1402(a) (1952), as amended, 28 U.S.C. § 1402(a) (1970). The court reasoned that the tax recovery statute had to be read in light of the expanded definition of corporate residence contained in section 1391(c), and thus allowed the corporation to file the action outside the place of its incorporation. 127 F. Supp. at 650-51. *Contra Albright & Friel, Inc. v. United States*, 142 F. Supp. 607, 608 (E.D. Pa. 1956).

Congress has since amended section 1402(a) so as to allow a corporation to file where it has its principal office or principal place of business. Act of Sept. 2, 1958, Pub. L. No. 85-920, 72 Stat. 1770, amending 28 U.S.C. § 1402(a) (1952) (codified at 28 U.S.C. § 1402(a) (1970)).

20. *E.g.*, *Chicago & N.W. Ry. Co. v. Davenport*, 94 F. Supp. 83, 85 (S.D. Iowa 1950).

It should be noted that the textwriters have also debated the proper interpretation of the statute. *E.g.*, 1 J. MOORE, *supra* note 10, at 1503; C. WRIGHT, LAW OF THE FEDERAL COURTS § 42, at 155-86 (2d ed. 1970). See 495 F.2d at 1185 n.5.

At the circuit court level, the Second, Fourth, and Fifth Circuits all rejected the liberal interpretation of section 1391(c) upon the grounds that this construction was syntactically unnatural and without support in the legislative history.<sup>21</sup>

Therefore, when the instant appeal was taken, the Third Circuit had to decide whether to follow this unbroken line of circuit court authority or be the first to construe the statute broadly to include corporate plaintiffs.<sup>22</sup> At the outset, the court reasoned that since the District of New Jersey was neither the district where all the defendants resided, nor where the claim had arisen, only one venue option remained to validate the suit in a New Jersey federal court under section 1391(a): the district where Cyanamid, the plaintiff, resided.<sup>23</sup> Thus, since Cyanamid had been incorporated in Maine, the court said the complaint had to be dismissed unless Cyanamid were correct in contending that section 1391(c) had generally expanded the definition of corporate residence for venue purposes.<sup>24</sup>

Cyanamid first argued that the second clause of section 1391(c) evinced the congressional intention to redefine the traditional concept of corporate residence by legislatively overruling the long line of judicial authority<sup>25</sup> which had restricted corporate residence to the state of incorporation.<sup>26</sup> In short, Cyanamid contended that section 1391(c)'s second clause made venue for corporate plaintiffs proper in the districts wherein they could be sued under the first clause.<sup>27</sup>

Rejecting this redefinition argument, the instant court agreed that Congress had expanded the concept of corporate residence to create proper venue in actions brought against corporations, but disagreed that the statute also made a similar change regarding corporate plaintiffs.<sup>28</sup> The court was convinced by its syntactical analysis that section 1391(c) only applied to corporate defendants.<sup>29</sup> According to the court, the term "such corporation"<sup>30</sup> in the second clause referred to the one described in the first clause.<sup>31</sup>

21. *Manchester Modes, Inc. v. Schuman*, 426 F.2d 629, 630-32 (2d Cir. 1970); *Robert E. Lee & Co. v. Veatch*, 301 F.2d 434, 437-38 (4th Cir. 1961), *cert. denied*, 371 U.S. 813 (1962), *noted in* 48 VA. L. REV. 968 (1962). In a short opinion, the Fifth Circuit adopted the reasoning of *Veatch*. *Carter-Beveridge Drilling Co. v. Hughes*, 323 F.2d 417 (5th Cir. 1963) (*per curiam*).

22. A substantial number of the district court decisions were subsequently overruled by the circuit court opinions contained in note 21 *supra*. See 495 F.2d at 1185 n.4. However, some of the district court opinions have not yet been overruled. See, e.g., *A.P. Green Refractories Co. v. Peerless Boiler & Eng'r Co.*, 303 F. Supp. 275 (E.D. Mo. 1969); *Hadden v. Barrow, Wade, Guthrie & Co.*, 105 F. Supp. 530 (N.D. Ohio 1952).

23. 495 F.2d at 1184. See note 3 *supra*.

24. 495 F.2d at 1185.

25. See note 10 *supra*.

26. 495 F.2d at 1185.

27. *Id.*

28. *Id.*

29. *Id.*

30. 28 U.S.C. § 1391(c) (1970). For the text of this statute, see text accompanying note 14 *supra*.

31. 495 F.2d at 1186.

Since the court reasoned that the corporation in the first clause was a defendant only, it concluded that "such corporation" in the second clause similarly referred solely to a defendant.<sup>32</sup> Furthermore, the court rejected the idea that Congress had completely overruled the long line of authority restricting corporate residence to the state of incorporation,<sup>33</sup> especially when the reviser's note which followed the disputed section made no reference to the traditional concept of corporate residence.<sup>34</sup> In view of this legislative silence, the court was constrained to follow a fundamental rule of statutory construction and not infer a change where none was clearly expressed.<sup>35</sup>

Cyanamid's second argument was that, despite the lack of supporting legislative history, the second clause had to be applied to corporate plaintiffs in order to avoid redundancy in section 1391(c).<sup>36</sup> The court responded that the second clause was not necessarily redundant under its interpretation restricting section 1391(c) to corporate defendants, since the language of the second clause was designed to be used to define the residence of a defendant corporation in connection with certain special venue statutes.<sup>37</sup> In support of this reasoning, the court observed that this was the Supreme Court's application of the clause in *Pure Oil Co. v. Suarez*.<sup>38</sup> The court reasoned that the second clause might have been formulated for the additional purpose of alleviating a joinder problem previously confronted by the Supreme Court in *Suttle v. Reich Brothers Construction Co.*<sup>39</sup>

32. *Id.* at 1186, quoting *Robert E. Lee & Co. v. Veatch*, 301 F.2d 434, 438 (4th Cir. 1961), cert. denied, 371 U.S. 813 (1962).

33. 495 F.2d at 1186. The court stated that its examination of the legislative history and the writings of the revisers of the pre-1948 Judicial Code failed to support Cyanamid's argument. *Id.* See note 11 *supra*. The revisers' writings are listed in the court's opinion. 495 F.2d at 1186 n.7.

34. 495 F.2d at 1186. The court stated that the revisers' notes purported to identify all changes in existing law. *Id.*, citing H. REP. NO. 308, *supra* note 11, at 7.

The note following section 1391(c) provides:

In subsection (c), references to defendants "found" within a district or voluntarily appearing were omitted. The use of the word "found" made section 111 of title 28, U.S.C., 1940 ed. ambiguous. The argument that an action could be brought in the district where one defendant resided and a non-resident was "found," was rejected in *Camp v. Gress* (citation omitted). However, this ambiguity will be obviated in the future by the omission of such reference.

H. REP. NO. 308, *supra* note 11, at A127, quoted in 495 F.2d at 1186 n.9.

35. 495 F.2d at 1186, quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 198 (1912).

36. 495 F.2d at 1186.

37. *Id.* at 1187.

38. *Id.*, citing *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966). See notes 51-54 and accompanying text *infra*.

39. 495 F.2d at 1187, citing *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163 (1947). The *Cyanamid* Court characterized the *Suttle* problem in the following manner:

There, a Mississippi resident brought suit in the Eastern District of Louisiana against a partnership whose members resided in the Western District, and a Texas corporation which had qualified to do business in Louisiana. Then, as now under 28 U.S.C.A. § 1392(a), the applicable venue rule was that in a suit against two or more "defendants residing in different districts in the same State," venue was proper in either district. Although the Eastern District would have

An examination of the language of section 1391(c) seems to support the statutory interpretations of both the court and *Cyanamid*. The statute begins by stating that a corporation may be sued in certain judicial districts and concludes that each of the districts "shall be regarded as the residence of such corporation for venue purposes."<sup>40</sup> The key term is "such corporation," which clearly refers to the corporation mentioned in the first clause, *i.e.* one that may be sued. However, the relationship between the term, "such corporation" and the antecedent phrase "[a] corporation may be sued"<sup>41</sup> can be defined in two distinct ways: One might adopt the *Cyanamid* court's position that since the first clause describes a corporation that is sued and not one that sues, the second clause should be similarly construed.<sup>42</sup>

Contrariwise one might argue as *Cyanamid* apparently did that the term "such corporation" refers not to a corporation that is in fact sued, but rather to one that *can be* sued, and since all corporations are able to be sued, "such corporation" includes all corporations.<sup>43</sup>

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been a proper venue district under the *Neirbo* rule in a suit against the Texas Corporation alone, the Supreme Court nevertheless held that venue was improperly laid under these facts. The Court emphasized, as noted earlier, that *Neirbo* had not changed the *Suttle* definition of corporate residence. (See note 10 *supra*.) Therefore, since the Texas corporation technically "resided" only in Texas, the predecessor to § 1392(a) could not be employed to make the Western District partnership suable in the Eastern District of Louisiana.

495 F.2d at 1187 (emphasis supplied by the court).

However, if section 1391(c) had been available to the Mississippi resident, the Texas corporation would have been considered a *resident* of Louisiana having qualified to do business there. Hence, venue would have been proper in either district.

*Cyanamid* also made two other arguments which the court briefly addressed. First, *Cyanamid* argued that the Supreme Court had supported a liberal interpretation in both *Pure Oil* and *Denver R.R. v. Railroad Trainmen*, 387 U.S. 556 (1967). The *Cyanamid* court replied that these cases had dealt only with venue for defendants, and their references to section 1391(c) had to be read in that context. 495 F.2d at 1187 n.10.

Second, the court found no merit in *Cyanamid's* policy arguments because its interpretation of the language had already precluded *Cyanamid's* statutory construction. *Id.*

40. 28 U.S.C. § 1391(c) (1970). For the text of section 1391(c), see text accompanying note 14 *supra*.

41. *Id.* The word "such" is generally used by legislatures as a demonstrative adjective in order to restrict the meaning of a subsequent clause to something previously identified. See Note, *Federal Venue and the Corporate Plaintiff*, 37 IND. L.J. 363, 371 (1962). It has been suggested, however, that this use is grammatically incorrect and responsible for problems of interpretation. *Id.*

42. See text accompanying notes 30-32 *supra*.

43. Although the court did not detail *Cyanamid's* syntactical analysis, it is submitted that the redefinition argument was based upon the analysis as stated, which has been used in the past. See *Robert E. Lee & Co. v. Veatch*, 301 F.2d 434, 438 (4th Cir. 1961), cert. denied, 371 U.S. 813 (1962); 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 80, at 320 (Wright ed. 1960); 1 J. MOORE, *supra* note 10, at 1501-02; C. WRIGHT, *supra* note 20.

However, while a bare textual analysis supports Cyanamid's construction,<sup>44</sup> it appears to be contrary to the legislative history. In reaching its conclusion that the statute applied to corporate defendants only, the Third Circuit relied upon the legislative record, which revealed that all necessary changes in existing law were described in the notes following each section of the 1948 revision.<sup>45</sup> Since the note following section 1391(c)<sup>46</sup> did not reveal that the statute was designed to completely redefine corporate residence, the court apparently believed that it had to adopt the interpretation which would have the least effect upon existing law.<sup>47</sup> Since Cyanamid's construction would have entailed a complete rejection of the traditional concept and thus a substantial change, the court's interpretation appears to be the more reasonable in light of the legislative record.<sup>48</sup>

Unfortunately, the legislative history was of little help to the court in its analysis of Cyanamid's redundancy argument<sup>49</sup> and, consequently, it would appear that the court's two explanations for the enactment of the second clause<sup>50</sup> were merely conjectural and inconsistent with its reliance upon the legislative record in rejecting Cyanamid's first contention. However, in light of *Pure Oil*, the Third Circuit's analysis of Cyanamid's redundancy argument may not be challenged simply because the legislative record fails to support the court. In *Pure Oil*, the Supreme Court reasoned that the second clause revealed the congressional intention that section 1391(c) be a definition of residence for corporate defendants<sup>51</sup> and as such, be applicable to most special venue statutes using the defendant's residence as a venue option.<sup>52</sup> The Supreme Court recognized that the legislative

44. See *Manchester Modes, Inc. v. Schuman*, 426 F.2d 629, 630 (2d Cir. 1970). Therefore, the court's contention that syntactical analysis alone disposed of Cyanamid's contention appears quite misleading. See 495 F.2d at 1186.

45. See note 33 *supra*. The legislative record also reveals that the revisers sought to avoid changes in existing law. See *Hearings on H.R. 1600 and 2055*, *supra* note 11, at 24.

46. See note 34 *supra*.

47. In effect, the *Cyanamid* court construed section 1391(c) as a legislative refinement of the corporate venue exception articulated by the Supreme Court in *Neirbo Co. v. Bethlehem Shipbldg. Corp.*, 308 U.S. 165 (1939). See note 10 *supra*. The statute has previously been viewed in this manner. See *Bethell & Friday, The Federal Judicial Code of 1948*, 3 ARK. L. REV. 146, 149 (1949). Under this interpretation, section 1391(c) was designed to eliminate any necessity for finding the *Neirbo* waiver and to allow suit where a corporation was doing business without a license granted by the state. *Id.*

48. 76 HARV. L. REV. 641, 644 (1963). However, it has been suggested that the legislative history is inconclusive and reveals only that section 1391(c) provoked no congressional debate. See Note, *supra* note 41, at 371; Note, *Federal Venue & the Corporate Plaintiff: Judicial Code Section 1391(c)*, 28 IND. L.J. 256, 260 (1953).

49. 495 F.2d at 1187.

50. See notes 38 & 39 and accompanying text *supra*.

51. 384 U.S. at 205.

52. *Id.* The *Pure Oil* Court distinguished an earlier decision, *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222 (1957), which had denied a similar application of section 1391(c) to the venue provision for patent infringement actions, 28 U.S.C. § 1400(b) (1952), 384 U.S. at 206-07. The *Pure Oil* Court reasoned that venue in patent infringement actions had long been restricted by Congress and that the *Fourco* Court had been reluctant to expand such venue by applying section 1391(c) without



history was silent as to the purpose of the second clause<sup>53</sup> but nevertheless concluded, that its interpretation was consistent with the general language of the statute and its liberalizing purpose of rendering corporations amenable to suit in the federal courts of the states in which they were incurring liabilities.<sup>54</sup>

Although the *Pure Oil* rationale cannot fill the void in the legislative record, it precludes any contention that the second clause is meaningless unless it refers to corporate plaintiffs.<sup>55</sup> Thus, Cyanamid's second argument was justifiably rejected on the strength of *Pure Oil* alone, regardless of the joinder argument's validity.<sup>56</sup>

The decision in *Cyanamid* represents the fourth time that a federal court of appeals has rejected the contention that section 1391(c) completely redefined the traditional concept of corporate residence for venue purposes.<sup>57</sup> In view of the instant decision, it is unlikely that a circuit court will deviate from this line and adopt the liberal interpretation in the future.

a clear indication in the legislative record that Congress intended this application. *Id.* Furthermore, the Court reasoned that since section 1400(b) had been reenacted in 1948 without change, Congress intended that it be unaffected by section 1391(c), a product of the same revision. *Id.* Upon this distinguishing basis the *Pure Oil* Court justified its application of section 1391(c) to the statute which it was considering, the venue provision of the Jones Act, 46 U.S.C. § 688 (1964). 384 U.S. at 206-07.

53. 384 U.S. at 204.

54. *Id.* at 204-05.

55. Although the instant court effectively disposed of Cyanamid's redundancy argument, it is submitted that there is a more reasonable explanation of the purpose of the second clause: It may have been intended to reconcile the first clause of section 1391(c) with section 1391(a). In 1948, section 1391(a) only allowed suit in either the residence of the plaintiff or of the defendant. *See* notes 3 & 12 *supra*. If only the first clause of section 1391(c) had been enacted, it would have allowed suit in districts other than those traditionally regarded as corporate residences, and therefore the second clause may have been designed to insure that all of the listed places were regarded as residences, thereby eliminating this basic inconsistency. *See* *United Merchants & Mfrs. v. United States*, 123 F. Supp. 435, 438 (M.D. Ga. 1954) (dictum); Comment, *supra* note 10, at 116; 51 MICH. L. REV. 440, 442 (1953).

56. In the instant case, the Third Circuit concluded that the joinder argument was less easily made than that regarding the special venue statutes. 495 F.2d at 1187. Although the court did not reveal the reasoning upon which this conclusion was based, it may have expressed this reservation because, unlike the special venue argument, there was no Supreme Court decision which could be cited as specifically including the joinder analysis within the purpose of the statute, and thus the joinder argument could be questioned as being mere speculation. *Cf. Manchester Modes, Inc. v. Schuman*, 426 F.2d 629, 631 (2d Cir. 1970). However, it is submitted that the court's analysis of *Suttle* can be justified by the *Pure Oil* rationale. *See* text accompanying notes 51-54 *supra*. As the court demonstrated in the instant case, the plain language of the second clause eliminates the joinder problem which had occurred in *Suttle*. *See* note 39 *supra*. Furthermore, if the statute had had the liberalizing purpose articulated by the *Pure Oil* Court, the elimination of joinder difficulties was certainly necessary to render corporations more amenable to suit.

57. Actually, the instant decision is a compendium of the earlier circuit court decisions. *See* note 21 *supra*. The court adopted the syntactical analysis and *Suttle* argument presented by Judge Sobeloff in *Robert E. Lee & Co. v. Veatch*, 301 F.2d 434, 438 (4th Cir. 1961), *cert. denied*, 371 U.S. 813 (1962). The *Pure Oil* rationale was first applied in *Manchester Modes, Inc. v. Schuman*, 426 F.2d 629, 632 (2d Cir. 1970).

Prior to 1966, this prediction would have been unwise. The Fourth Circuit's decision in *Robert E. Lee & Co. v. Veatch*,<sup>58</sup> the first to construe the statute against corporate plaintiffs, was severely criticized by one commentator who argued that this conservative interpretation would, under certain facts, preclude suit in the most convenient forum.<sup>59</sup> However, this criticism was made prior to the addition of "where the claim arose" as a venue option under section 1391(a).<sup>60</sup> Hence, as a result of that amendment, a circuit court no longer needs to remedy the statutory omission with a liberal interpretation of the statute, in order to provide the best forum for trial.<sup>61</sup>

In view of the formidable line of authority for the limited construction, the dispute concerning the proper interpretation of section 1391(c) is nearing an end. However, a judicially final resolution of the debate cannot be achieved unless the Supreme Court considers the question.<sup>62</sup>

James A. Swetz

FEDERAL CIVIL PROCEDURE — FED. R. CIV. P. 23(e) — DISTRICT COURT APPROVAL OF A CLASS ACTION SETTLEMENT TO WHICH MORE THAN TWENTY PERCENT OF THE CLASS PLAINTIFFS OBJECT DOES NOT CONSTITUTE AN ABUSE OF DISCRETION.

*Bryan v. Pittsburgh Plate Glass Co.* (1974)

Three women formerly employed at the Pittsburgh Plate Glass Company's Creighton plant instituted a class action in the United States District Court for the Western District of Pennsylvania on behalf of women presently or formerly employed at the plant, alleging that defendants Pittsburgh Plate Glass (PPG) and the United Glass and Ceramic Workers (the Union) engaged in sex discrimination in violation of Title VII of the Civil

58. 301 F.2d 434 (4th Cir. 1961), *cert. denied*, 371 U.S. 813 (1962).

59. Note, *supra* note 48, at 644. In *Veatch*, a South Carolina corporation and a Georgia corporation doing business in South Carolina sued a partnership, whose members resided in Missouri, in a federal court in South Carolina, where the claim arose. 301 F.2d at 435. As a result of the *Veatch* court's restrictive interpretation of section 1391(c), the Georgia corporation was denied access to the federal courts in South Carolina and had to either sue in a state court or go to Missouri. See Note, *supra* note 48, at 644.

60. See note 12 *supra*.

61. Cf. *Manchester Modes, Inc. v. Schuman*, 426 F.2d 629, 633 n.6 (2d Cir. 1970).

62. The Supreme Court has recognized the problem posed by section 1391(c). *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 156-57 n.20 (1967).

Rights Act of 1964 (Title VII).<sup>1</sup> Plaintiffs based their allegation upon the fact that an agreement between PPG and the Union, which terminated the employment rights of employees laid off from work at the Creighton plant for more than 5 years, affected the rights of 452 women, but no men.<sup>2</sup> The district court found that the 452 women whose rights were terminated by the agreement comprised a proper class for maintenance of a class action pursuant to both rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure.<sup>3</sup> Trial proceeded until agreement upon settlement was reached.<sup>4</sup> After class members<sup>5</sup> were notified of the terms of the proposed settlement and were given an opportunity to object, the district court, pursuant to rule 23(e),<sup>6</sup> approved the settlement.<sup>7</sup> Eighty-two plaintiffs

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1. *Bryan v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616 (W.D. Pa. 1973). Plaintiffs' claim arose under sections 703(a) and 703(c) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), (c) (1970), as amended, (Supp. III, 1974). Section 703(a) prohibits discrimination by an employer in hiring, compensation, terms, conditions or privileges of employment, and segregation or classification of employees based upon race, color, religion, sex, or national origin. *Id.* § 2000e-(2)(a). Section 703(c) prohibits labor organizations from discriminating against its members upon the basis of race, color, religion, sex, or national origin. *Id.* § 2000e-(2)(c).

2. 59 F.R.D. at 617. *See Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir.), cert. denied, 419 U.S. 900 (1974). Sex discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) had resulted not in a final determination, but in a "right-to-sue" letter's being issued to complainants. 494 F.2d at 801.

3. 59 F.R.D. at 616. Rule 23(b) provides in pertinent part:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . .

FED. R. CIV. P. 23(b)(2), (3).

4. 59 F.R.D. at 617. The settlement agreement required, in part, that a fund of \$931,724 be divided among class members in proportion to the number of months each class member had worked at the Creighton plant. *Id.*

5. Some of the 452 women comprising the initially defined class requested exclusion pursuant to rule 23(c)(2), and the final class had 371 members. *Id.* at 616. Rule 23(c)(2) provides in pertinent part that "the court will exclude [a member] from the class if he so requests by a specified date . . ." FED. R. CIV. P. 23(c)(2)(A).

6. FED. R. CIV. P. 23(e). The rule provides:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

*Id.*

7. 59 F.R.D. at 618. The district court determined that the settlement was a fair, reasonable, and adequate compromise of plaintiffs' claim in view of the pleadings, interrogatories and the answers thereto, pretrial stipulations, evidence and testimony adduced both at trial and at the settlement hearing, briefs submitted by the parties, and uncertainties and risks of future litigation. *Id.* at 617.

objected to the terms of the agreement and appealed,<sup>8</sup> contending, *inter alia*, that the district court had abused its discretion in approving the settlement and that class representatives could not bind class members who objected to the settlement.<sup>9</sup> The Third Circuit affirmed, *holding* that although the settlement granted plaintiffs only a small percentage of backpay, and more than 20 percent of the class plaintiffs objected to the terms, the district court had not abused its discretion in approving the settlement. The court further held that the settlement was binding upon the objecting plaintiffs. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.), *cert. denied*, 419 U.S. 900 (1974).

The Federal Rules of Civil Procedure have, since their promulgation in 1937, prohibited the dismissal or compromise of a class action without court approval.<sup>10</sup> Such court approval, which has a *res judicata* effect upon all members of the class,<sup>11</sup> was intended to protect the interests of nonparty class members<sup>12</sup> and assure fairness to all class members as well as to prevent class action suits from being used as a device for unjust enrichment.<sup>13</sup> The decision whether or not to approve a proposed settlement as

8. 494 F.2d at 801. All class members had had a right to appear at a hearing to state objections to the proposed settlement. 59 F.R.D. at 617. Failure to appear and object bars appeal of the court's decision approving the settlement and dismissing the action. 7A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1797, at 232-33 (1972) [hereinafter cited as WRIGHT & MILLER]. The right of nonparty class members to appeal a compromise approval was recognized at least as early as 1942. *Cohen v. Young*, 127 F.2d 721, 724 (6th Cir. 1942), *cert. denied*, 321 U.S. 778 (1944). See 3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.80, at 1557 (2d ed. 1969) [hereinafter cited as MOORE].

9. 494 F.2d at 801, 803. Plaintiffs also argued that even if there had been no abuse of discretion, the class should have been divided into two subclasses as authorized by rule 23(c)(4)(B). *Id.* at 804. See note 19 *infra*.

10. FED. R. CIV. P. 23(e). For the complete text of rule 23(e), see note 6 *supra*. See generally 3B MOORE, *supra* note 8, ¶ 23.80, at 1501-02.

11. Rule 23(c)(3) provides:

The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

FED. R. CIV. P. 23(c)(3). See 3B MOORE, *supra* note 8, ¶ 23.80, at 1502; Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 976-77 (1971). There is no *res judicata* effect upon those who have requested exclusion. FED. R. CIV. P. 23(c)(3).

12. See 7A WRIGHT & MILLER, *supra* note 8, § 1797, at 226 & n.27. Nonparty class members are also protected by the mandate of rule 23(a), which makes fair and adequate representation a prerequisite to maintaining a class action, by the notice requirement of rule 23(e), and by the subsequent "fairness hearing" which is usually granted by the court in order to allow nonparty class members to voice objections to a proposed settlement. See FED. R. CIV. P. 23(d)(2), (4). See also Dole, *supra* note 11, at 981.

13. Prior to the enactment of the rule requiring court approval of class action settlements, a plaintiff could bring a class action and negotiate a settlement for an amount exceeding his damages in return for his abandonment of the suit. *Levy, Class*

fair and reasonable is within the sound discretion of the court<sup>14</sup> and will be reversed only when an abuse of that discretion has been clearly shown.<sup>15</sup>

While the absence of any opposition to the settlement is a significant factor which the court may consider when approving or disapproving a class action settlement,<sup>16</sup> before *Bryan* only one district court, in *Amalgamated Meat Cutters Local 340 v. Safeway Stores, Inc.*,<sup>17</sup> had been faced with determining the fairness of a settlement when a significant portion of the class members opposed its terms. The *Amalgamated* court rejected the proposed settlement, in part because slightly more than 25 percent of the class members felt the compromise was grossly unfair.<sup>18</sup> However, the court did not discuss the weight it gave this factor.

In *Bryan*, appellants primarily claimed that the district court had abused its discretion in approving the settlement and dismissing the complaint with prejudice.<sup>19</sup> To support this claim, they advanced a two-

*Action Settlement Techniques and Procedures*, 19 PRAC. LAW., Dec., 1973, at 69. See also 3B MOORE, *supra* note 8, ¶ 23.80, at 1551-55.

14. *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971); *Cohen v. Young*, 127 F.2d 721, 725-26 (6th Cir. 1942), *cert. denied*, 321 U.S. 778 (1944); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

15. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

16. *Hartford Hosp. v. Chas. Pfizer & Co.*, 52 F.R.D. 131, 137 (S.D.N.Y. 1971). For a discussion of other factors courts have found relevant, see 7A WRIGHT & MILLER, *supra* note 8, § 1797, at 230-31.

17. 52 F.R.D. 373 (D. Kan. 1971). The case arose as a result of a complaint filed with the EEOC by the union and three employee members on behalf of all female employees in certain job classifications at a meatpacking and meathandling department. The *Amalgamated* court characterized the plaintiffs' claim as alleging a discriminatory differential in pay for the same type of work, in violation of section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (1970). 52 F.R.D. at 374.

This characterization is confusing because section 706(e) is procedural; the discriminatory practice would appear to be in violation of section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970), *as amended* (Supp. III, 1974).

18. 52 F.R.D. at 374, 376. Twenty-two of the eighty-five class members objected, several upon the grounds that the gross settlement amount did not compensate overtime for which they would have been paid at the rate of 1½ times the regular hourly wage. *Id.* at 374-75. In rejecting the settlement, the court considered the class members' objections and the fact that plaintiffs' counsel was subject to a potential conflict of interest since he represented both the union and the class members. The court also observed that the determinations of fact and law in the case were not as complex as the proponents of the settlement believed. *Id.* at 375-76.

In addition, the court specifically noted that the group of objecting class members included one of the named plaintiffs, but did not discuss the significance of this fact. *Id.* at 374. It could be argued that the court should consider the fact that the group opposing the settlement includes one or more named plaintiffs, since they have been actively involved in the litigation and have more at stake than unnamed class members who make a relatively small contribution to the conduct of the suit.

19. 494 F.2d at 801. Appellants argued in the alternative that in the absence of an abuse of discretion, the class should have been divided into two subclasses: the more senior class members, interested, according to appellants, only in securing back-pay; and those, like appellants, desiring reinstatement as well. *Id.* at 804. The court

pronged argument: 1) that the strength of the merits of their case made it an abuse of discretion to approve the settlement as fair and reasonable,<sup>20</sup> and 2) that such approval was arbitrary because more than 20 percent of the plaintiffs objected to the terms of the settlement.<sup>21</sup>

The Third Circuit, in disposing of appellants' argument based upon the merits of the case, agreed with appellants that, after the presentation of their evidence,<sup>22</sup> a prima facie claim of sex discrimination had been established.<sup>23</sup> Thus, if the trial had continued, the burden of proof would have shifted, requiring defendants to justify their discriminatory conduct.<sup>24</sup> However, the court determined that appellees' asserted "business purpose"<sup>25</sup> of securing a work force of balanced age, coupled with their allegations indicating a questionable discriminatory effect, could potentially meet this burden.<sup>26</sup> Similarly, PPG's claim of a "bona fide occupational qualification," an exception to the sex discrimination prohibitions

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rejected this argument, distinguishing the instant case from *Air Line Stewards & Stewardesses Ass'n v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973).

In *Air Line Stewards*, the original class consisted of two subgroups: first, presently employed stewardesses who sought prospective relief; and second, stewardesses whose employment had been terminated because they had become pregnant, and who sought reinstatement. When the claims of the first subgroup became moot because of a collective bargaining agreement, their interests became antagonistic to those of the formerly-employed stewardesses. Therefore, the court divided the class into two subclasses, using the subgroup Lines. *Id.* at 638-43. *See also* 494 F.2d at 804.

In the instant case, all members of the class as originally defined sought the same relief until some members objected to the settlement. *Id.* at 804. However, while their interests then became antagonistic to those of the class, the court refused to accept appellants' presumption that the senior members of the class sought only back-pay and hence constituted a clearly defined subclass such as had existed in *Air Line Stewards*. *Id.*

20. 494 F.2d at 801.

21. *Id.* at 803. Plaintiffs' principal objection to the terms of the settlement was that they would thereby receive only a small portion of their requests for backpay. *Id.* at 802.

22. The parties had agreed upon the settlement after the plaintiffs had presented their case. 59 F.R.D. at 617.

23. 494 F.2d at 801. Plaintiffs showed a past discriminatory practice and an action having an immediate discriminatory impact upon employment rights. *Id.* *See note* 28 *infra*.

24. 494 F.2d at 802, *citing* *Muniz v. Beto*, 434 F.2d 697, 700 (5th Cir. 1970).

25. The judicially created "business purpose" or "business necessity" doctrine can be used to justify employment practices which are inherently discriminatory when the practice fosters safety and efficiency and is essential to achieving these goals. *Rock v. Norfolk & W. Ry. Co.*, 473 F.2d 1344, 1349 (4th Cir.), *cert. denied*, 412 U.S. 933 (1973); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

26. 494 F.2d at 802. Defendants asserted that although the seniority cutoff agreement between PPG and the Union initially terminated only the employment rights of women, at a later date it also terminated the rights of men, and that continued adherence to the agreement would eventually result in the extinction of the employment rights of women. *Id.* When women, in the court's view, these allegations indicated that the challenged conduct was not inherently discriminatory. *Id.*

of Title VII,<sup>27</sup> provided a potentially sufficient defense to appellants' contentions.<sup>28</sup>

Considering the strength of these defenses, the fact that plaintiffs made no attempt to substantiate their claim for backpay,<sup>29</sup> and the discretionary nature of an award of backpay,<sup>30</sup> the court found it highly unlikely that plaintiffs could have recovered. Moreover, the court noted plaintiffs' suit appeared to be barred by their failure to file charges with the Equal Employment Opportunity Commission (EEOC) within the statutorily prescribed time period.<sup>31</sup> Despite this probable foreclosure of plaintiffs' suit, it is submitted that, because the district court did consider the merits,<sup>32</sup> and because one criterion for determining the fairness of a settlement requires an assessment of the probable outcome of the litigation,<sup>33</sup> a fortiori it appears

27. 42 U.S.C. § 2000e-2(e) (1970), *as amended* (Supp., 1974). This exception permits an employer to escape being found in violation of Title VII if he sustains the burden of proving that he had a belief, supported by facts, that all or substantially all women would be unable to perform the duties of the job safely and efficiently. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). It has been held that an employer has discretion within which he, in good faith, may determine that a sex qualification is reasonably necessary to the normal operation of his particular business. *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332, 360-61 (S.D. Ind. 1967), *aff'd in part, rev'd in part on other grounds*, 416 F.2d 711 (7th Cir. 1969).

As the instant court noted, PPG claimed that unlike men, most women would be incapable of the required repetitive lifting of heavy loads of glass. 494 F.2d at 802 n.2. This claim apparently would have brought defendants' conduct within the "bona fide occupational qualification" exception, and thus appears to have been capable of defeating plaintiffs' claims upon the merits. *See id.* at 802.

28. 494 F.2d at 802. PPG advanced this occupational qualification argument in response to appellants' contention that the seniority cutoff agreement was discriminatory in view of PPG's established system of classifying jobs along sexual lines. *Id.* During a business upswing, PPG had filled "male only" jobs by recalling men from layoff and by hiring new male employees. No women were recalled from lay-off, though some women had had greater job seniority than recalled men. This classification system was abandoned in 1973, pursuant to a conciliation agreement reached after complaints were filed with the EEOC. *Id.* at 800-01.

29. *Id.* at 802.

30. Section 706(g) of the Civil Rights Act of 1964 provides that if the court finds an intentional unlawful employment practice in violation of the Act, it may "order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, *with or without back pay* . . ." 42 U.S.C. § 2000e-5(g) (1970), *as amended* (Supp. III, 1974) (emphasis added). *See Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 247-50 (3d Cir. 1973), *noted in* 19 VILL. L. REV. 353 (1973). While the Fourth and Seventh Circuits are inclined to grant backpay, the Fifth, Sixth, and Ninth generally do not. In *Kober*, the Third Circuit adopted the latter view. 480 F.2d at 247.

31. 494 F.2d at 802. At the time of the suit, the time limit for filing such charges was 90 days from the occurrence of the alleged unlawful practice. Act of July 2, 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 259. The present time limit is 180 days. 42 U.S.C. § 2000e-5(e) (1970), *as amended* (Supp. III, 1974). *See, e.g., Mickel v. South Carolina State Employ. Serv.*, 377 F.2d 239, 241-42 (4th Cir. 1967).

32. 59 F.R.D. at 617-18.

33. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); 7A WRIGHT & MILLER, *supra* note 8, § 1797, at 230-31. "The basic test for fairness involves weighing the probability and consequences of success on the merits against the terms of the settlement." *Dole, supra* note 11, at 981.

that the *Bryan* court could find no abuse of discretion in the district court's determination that the merits favored the defendants.

With regard to the argument that district court approval of the settlement was improper because more than 20 percent of the class plaintiffs objected,<sup>34</sup> the Third Circuit stated that although the proportion of the class opposed to the settlement was one factor to consider, it was not determinative of the fairness of such an agreement.<sup>35</sup> After noting that the drafters of rule 23 included no requirement that a settlement be disapproved if a certain proportion of the class oppose it,<sup>36</sup> the court considered appellants' specific contentions.

Appellants asserted that the number of objectors, coupled with the fact that the right to be free from discrimination is personal, made the settlement's approval an abuse of the court's discretion<sup>37</sup> because the court should not force class members to abandon *personal* — as opposed to joint — rights without a judicial decision upon the merits.<sup>38</sup> However, the court recognized this as an attempt to resurrect previous rule 23 concepts and to classify the class action as "spurious," with the result that the judgment would bind only parties to the suit.<sup>39</sup> The court rejected this attempt by pointing out the well-accepted fact that the present rule 23 abandons any categorization of class actions according to the nature of the rights involved.<sup>40</sup>

To further support their claim, appellants, and the EEOC as amicus curiae, drew a parallel between a private class action pursuant to Title VII and actions prosecuted thereunder by the Attorney General.<sup>41</sup> When the Attorney General brings suit under Title VII, that action cannot bind discriminatees as either *res judicata* or collateral estoppel because they are neither parties to the suit nor in privity with the Attorney General.<sup>42</sup> Appellants argued by analogy that in a Title VII suit, class representatives function as "private attorneys general," and their action, like that brought

34. 494 F.2d at 803.

35. *Id.* Cf. 7A WRIGHT & MILLER, *supra* note 8, § 1797, at 230.

36. 494 F.2d at 803.

37. *Id.* See Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

38. 494 F.2d at 803.

39. *Id.* See FED. R. CIV. P. 23, Advisory Comm. Notes, 39 F.R.D. 98-99 (1966). Before the 1966 amendments to the Federal Rules, class actions were categorized as "true," "hybrid," and "spurious." "True" class actions involved joint, common, or secondary rights; the "hybrid" category involved "several" rights related to specific property; and the "spurious" category involved "several" rights affected by a common question and related to common relief. Rule 23 was intended to discard such distinctions. *Id.*

40. 494 F.2d at 803. See Snyder v. Harris, 394 U.S. 332, 335 (1970); 3B MOORE, *supra* note 8, ¶ 23.80, at 1501-03. The court stated that any impropriety in court approval of a settlement must spring from the nature of specific rights asserted by the class, not of personal rights in general. 494 F.2d at 803.

41. 494 F.2d at 803. Sections 706(e) and 707(a) of the Civil Rights Act of 1964 empower the Attorney General to intervene in or bring suit for a violation of Title VII.

42. Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972).



by the Attorney General, should not bind dissenting plaintiffs.<sup>43</sup> The court rejected this contention on the grounds that, first, the district court, not the class representatives, binds the dissenting class members by its final determination that the settlement is fair and reasonable; and second, by its nature, a class action seeks to redress wrongs only to the particular individuals in the class, and therefore it differs from a suit brought by the Attorney General or by private attorneys general to protect public rights.<sup>44</sup>

Although the court's conclusion appears valid, its statement that the *class representatives* do not bind dissenting members evidences an apparent misunderstanding of appellants' argument. Appellants simply attempted to analogize the effect of an *action* brought by class representatives functioning as private attorneys general to that of an *action* brought by the Attorney General; the court's answer failed to deal with this contention. Despite the inadequacy of the court's first ground for rejecting appellants' analogy, the distinction between public and private suits seems to provide sufficient justification for rejecting appellants' argument. The inherent differences between private class action suits and suits by the Attorney General<sup>45</sup> support the court's determination that "[i]t does not seem anomalous to allow a court-approved class settlement, but not a suit by the Attorney General, to compromise a discriminatee's Title VII claim."<sup>46</sup> Moreover, the recognition that private class actions are usually concerned with compensation for damages from *past* or existing conduct, while public interest suits are concerned with achieving broad public goals to be implemented by *future* conduct, provides added support for the court's conclusion.

Therefore, it seems as though the court rightly refused to disapprove the settlement solely because a significant number of class members objected. Indeed, had the court accepted appellants' argument instead of making the settlement binding upon *all* class members, it would have created the anomalous situation wherein a class member, who initially had had the opportunity to "opt out",<sup>47</sup> could choose to remain in the class until settlement and then, if not satisfied with its terms, could litigate his or her claim separately. This result would contravene one of the principal purposes of class action litigation — the prevention of multiple actions involving common questions.<sup>48</sup>

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43. 494 F.2d at 803.

44. *Id.*

45. *Id.* The court stated:

The Attorney General's prosecution of a suit is governed by desire [*sic*] to achieve broad public goals and the need to harmonize public policies that may be in conflict; practical considerations, such as where limited resources can be concentrated most effectively, may dictate conduct of a suit inimical to the immediate interests of the discriminatee, who presumably seeks full satisfaction of his individual claim regardless of the effect on other cases.

*Id.* The court also noted that class members had the opportunity to opt out of the suit. *Id.* See note 5 *supra*.

46. 494 F.2d at 803.

47. See note 5 *supra*.

48. 7 WRIGHT & MILLER, *supra* note 8, § 1751, at 509.

The Third Circuit's analysis of appellants' "abuse of discretion" claim, viewed as a whole, seems clearly to validate the district court's approval of the settlement.<sup>49</sup> In light of the uncertainty of plaintiffs' success had the trial gone to conclusion, and considering their failure to advance convincingly an argument that the percentage of the class objecting was a determinative factor to be considered by the district court, it appears that the appellate court could not have intervened because there had been no showing that the trial court clearly had abused its discretion. Since the phrase "abuse of discretion" is not subject to exact definition,<sup>50</sup> the *Bryan* court's decision on this issue seems insulated from adverse criticism.<sup>51</sup>

The instant opinion may simply be an example of the difficulty presented by claiming on appeal that a district court's approval of a settlement

49. As one court has stated:

Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.

The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation, \* \* \* and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." The Supreme Court then emphasizes: "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

*West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740-41 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), *quoting* *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968).

50. As the Sixth Circuit has stated:

There is no exact measure of what constitutes abuse of discretion. It is more than the substitution of the judgment of one tribunal for that of another. Judicial discretion is governed by the situation and circumstances affecting each individual case. "Even where an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion, that is, arbitrary action not justifiable in view of such situation and circumstances."

*NLRB v. Guernsey-Muskingum Elec. Co-op., Inc.*, 285 F.2d 8, 11 (6th Cir. 1960), *quoting* *Hartford-Empire Co. v. Obear-Nester Glass Co.*, 95 F.2d 414, 417 (8th Cir. 1938).

51. Appellants also challenged the sufficiency of the district court's statement of reasons for approving the settlement. The *Bryan* court summarily dismissed this contention by noting that requiring a more comprehensive statement than that appearing in the district court's opinion would be tantamount to mandating a determination of the merits thus virtually eliminating settlements. 494 F.2d at 804.

The dilemma of a court ruling upon the reasonableness of a settlement was articulated by the Second Circuit:

[I]n reviewing the compromise, this court need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues which the case raises, yet at the same time we are apparently required to attempt to arrive at some evaluation of the points of law on which the settlement is based.

*West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

is an abuse of discretion. While approval of a settlement must depend upon the facts of the case and the terms of the settlement, it is suggested that *Bryan* should not be read narrowly to indicate that class action settlements are proper only when 20 percent or less of the class members object. Rather, this opinion should be interpreted as a firm commitment to encouraging class action settlements which bind all class members. When viewed in this light, it is squarely in line with the public policy of compromise and the judicial policy of generally easing the burden upon the federal courts which formed a part of the basis of recent Supreme Court decisions placing limitations upon the ability to bring class action suits.<sup>52</sup>

Jack R. Goldberg

FEDERAL JURISDICTION — MANDAMUS ACT OF 1962 — FEDERAL COURTS HAVE AUTHORITY, UNDER CERTAIN CIRCUMSTANCES, TO COMPEL DISCRETIONARY ACTIONS OF OFFICERS AND EMPLOYEES OF THE UNITED STATES BY WRIT OF MANDAMUS.

*Chaudoin v. Atkinson* (1974)

Plaintiff was employed as a civilian technician by the Delaware National Guard (Guard).<sup>1</sup> Section 709(b) of the National Guard Technicians Act of 1968<sup>2</sup> required that he also be a member of the Guard, and, taking

52. In *Snyder v. Harris*, 394 U.S. 332 (1970), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court reached conclusions which, in effect, make bringing class actions more difficult. In *Snyder*, the Court refused to allow aggregation of individual class members' claims in order to meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a). 394 U.S. at 337-41. In *Zahn*, the Court made it clear that in a diversity suit each individual, named and unnamed, in a class action must meet the jurisdictional amount requirement of section 1332(a).

The Court also restricted the potential effectiveness of class actions through its decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), wherein it determined that Federal Rule of Civil Procedure 23 requires the plaintiff to bear the expense of providing individual notice to all class members who can be identified with reasonable effort. *Id.* at 2152.

1. Plaintiff's employment as an administrative supply technician was authorized by the National Guard Technicians Act of 1968, which provides in pertinent part:

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in—

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

32 U.S.C. § 709(a) (1970).

2. Section 709(b) provides:

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(b) (1970).

advantage of this dual status, the plaintiff's supervisor ordered him to participate in a uniformed firing squad at a military funeral.<sup>3</sup> Plaintiff refused because he said this duty was not within his job description.<sup>4</sup> As a consequence, the Adjutant General of the State of Delaware, acting in his civilian capacity as supervisor of National Guard technicians,<sup>5</sup> discharged him.<sup>6</sup> Plaintiff thereafter brought suit in the United States District Court for the District of Delaware<sup>7</sup> seeking damages, injunctive relief,<sup>8</sup> and reinstatement to the position from which he had been dismissed.<sup>9</sup> Jurisdiction was allegedly based upon the general federal question statute,<sup>10</sup> section 10 of the Administrative Procedure Act,<sup>11</sup> and the Mandamus and Venue Act of 1962 (Mandamus Act).<sup>12</sup> Upon cross-motions for summary judgment,<sup>13</sup> the district court determined that it had jurisdiction,<sup>14</sup> but refused

3. *Chaudoin v. Atkinson*, 494 F.2d 1323, 1326 (3d Cir. 1974). Plaintiff's supervisor was a captain in the Guard unit. *Id.*

4. *Id.* Plaintiff's official job description outlined his duties in detail. See note 46 and accompanying text *infra*.

5. The Technicians Act provides in pertinent part:

(c) The Secretary concerned shall designate the adjutants general . . . to employ and administer the technicians authorized by this section.

32 U.S.C. § 709(c) (1970).

6. 494 F.2d at 1327.

7. *Chaudoin v. Atkinson*, Civil No. 4197 (D. Del., Feb. 16, 1973) (hereinafter cited as Civil No. 4197).

8. The plaintiff sought an injunction prohibiting his superiors from requiring him to perform any further tasks not authorized by his job description. *Id.* at 3.

9. *Id.* See 494 F.2d at 1326.

10. The federal question statute provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331(a) (1970).

11. Section 10(a) of the Administrative Procedure Act provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702 (1970).

12. The Mandamus Act provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1361 (1970).

13. Actually, the defendant had moved, pursuant to rule 12(b)(6) of the *Federal Rules of Civil Procedure*, to dismiss the complaint for failure to state a claim upon which relief could be granted, while the plaintiff had moved for summary judgment under rule 56 of the *Federal Rules of Civil Procedure*. However, counsel for both parties stipulated at oral argument that if the court were to determine that it had jurisdiction, it should decide the case as though it were before the court on cross-motions for summary judgment. 494 F.2d at 1326.

14. The district court found jurisdiction under both the Mandamus Act and the federal question statute. Civil No. 4197 at 5-6. With respect to jurisdiction under the Mandamus Act, the district court said that jurisdiction in federal employee reinstatement cases had been "tacitly acknowledged" by the Third Circuit in *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969). Civil No. 4197 at 4-5. This statement by the district court appears unfounded, however, since *Charlton* found jurisdiction under the Administrative Procedure Act. See 412 F.2d at 392. Also, the *Charlton* holding

to grant a writ of mandamus.<sup>15</sup> On appeal, the Third Circuit reversed and remanded, *holding, inter alia*, that the court had jurisdiction under the Mandamus Act to compel the performance of an action statutorily committed to the discretion of an officer or employee of the United States, when he abuses that discretion. The court further held that the defendant-adjutant general had abused his discretion and that, therefore, the plaintiff should be reinstated. *Chaudoin v. Atkinson*, 494 F.2d 1323 (3d Cir. 1974).

Prior to 1962, the authority of the federal courts to issue original writs of mandamus was extremely limited.<sup>16</sup> There were two fundamental limitations upon this authority,<sup>17</sup> the first and most basic of which derived from the federal courts' lack of jurisdiction, outside of the District of Columbia, to issue these writs.<sup>18</sup> The Supreme Court of the United States, in 1813, had decided that the statutory grant of jurisdiction to the federal courts did not include the authority to issue original writs of mandamus.<sup>19</sup> Later, the Supreme Court modified this situation to allow the District of Columbia federal courts to issue original writs of mandamus,<sup>20</sup> but the other federal courts were fettered until the passage of the Mandamus Act in 1962.<sup>21</sup> The purpose of this Act was not to enlarge the scope of the mandamus action, but to attempt to give all federal courts an authority to review and compel official action equal to that of the District of Columbia Circuit.<sup>22</sup>

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has been undermined by the Third Circuit's more recent holding in *Zimmerman v. United States*, 422 F.2d 326 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970). See note 27 and accompanying text *infra*.

15. Civil No. 4197 at 13. The district judge found no abuse of discretion by the defendant. *Id.*

16. Comment, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 46-50 (1957).

17. Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 308-10 (1967).

18. *Id.*

19. *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). This decision involved an interpretation of the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, which conferred jurisdiction in "all suits of a civil nature at common law or in equity." The Court held that this language did not include jurisdiction to issue original writs of mandamus. 11 U.S. at 506.

20. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). The Supreme Court granted the District of Columbia court this unique authority upon the basis of a statute which provided that the laws of the State of Maryland should apply in the territory sculpted from that state to create the District of Columbia. Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103. The Court reasoned that, since Maryland courts had authority to issue original writs of mandamus, the courts of the District should have the same power. 37 U.S. at 621, 626.

21. *Marshall v. Crotty*, 185 F.2d 622, 627 (1st Cir. 1950); Byse & Fiocca, *supra* note 17, at 311; H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1378 (2d ed. 1973). The Mandamus Act of 1962 is codified at 28 U.S.C. § 1361 (1970). For the text of the Act, see note 12 *supra*.

22. The Senate report provided, in part:

The purpose of this bill, as amended, is to make it possible to bring actions against government officials and agencies in U. S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U. S. District Court for the District of Columbia

Even after the passage of the Act, however, there remained a question as to the scope of the authority it granted. This uncertainty existed because of the second fundamental restriction upon a court's authority to issue writs of mandamus; that the writ is an appropriate remedy only when the government official's action sought to be compelled is an absolute or "ministerial"<sup>23</sup> duty. The normal rule, oft-repeated in cases where a writ of mandamus is sought, is that judicial interference by the writ is not permissible when the activity sought to be compelled is within the defendant official's discretion.<sup>24</sup> This common law limitation is reflected in the legislative history of the Mandamus Act. The Senate report on the Act contains language mirroring the restrictive, ministerial-discretionary dichotomy and casting doubt upon the authority of the federal courts to take action similar to that taken by the *Chaudoin* court.<sup>25</sup>

The importance of *Chaudoin*, then, lies in its apparent circumvention of the traditional writ of mandamus rule precluding judicial intervention in governmental actions committed to the discretion of particular officials. It is submitted, however, that what the court actually accomplished was not so much a circumvention of the traditional rule, as a more rational and useful interpretation of the federal courts' authority under the Mandamus Act.

The court began by analyzing the various grounds for jurisdiction alleged by the plaintiff. The allegation of jurisdiction under section 10(a)

. . . . This bill will not give access to the Federal Courts to an action which cannot now be brought against a Federal official in the U. S. District Court for the District of Columbia.

S. REP. NO. 1992, 87th Cong., 2d Sess. 2-4 (1962). See also Byse & Fiocca, *supra* note 17, at 318; K. DAVIS, ADMINISTRATIVE LAW TEXT § 23.06 (3d ed. 1972).

23. "Ministerial" is the term most frequently used in traditional mandamus cases to denote the kinds of duties which can be judicially compelled by the writ. As a term of art, ministerial duty is defined as

[o]ne regarding which nothing is left to discretion — a simple and definite duty, imposed by law and arising under conditions admitted or proved to exist . . . . It arises when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual.

BLACK'S LAW DICTIONARY 1148 (4th ed. 1951) (citations omitted). See, e.g., *Richardson v. United States*, 465 F.2d 844, 849 (3d Cir. 1972); *United States v. Walker*, 409 F.2d 477, 480 (9th Cir. 1969); *Prairie Band of Pottawatomie Tribe v. Udall*, 355 F.2d 364, 367 (10th Cir. 1966).

24. The Supreme Court has said:

Where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and peremptory, mandamus is not an appropriate remedy.

*United States ex rel. Girard Trust v. Helvering*, 301 U.S. 540, 543 (1937). See also *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930); *Work v. Rives*, 267 U.S. 175 (1925).

25. The Senate report provides in pertinent part:

[J]urisdiction conferred on the district courts by the bill is limited to compelling a government official or agency to perform a duty owed to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer or agency in the making of the decision.

S. REP. NO. 1992, 87th Cong., 2d Sess. 4 (1962)

of the Administrative Procedure Act<sup>26</sup> was summarily dismissed;<sup>27</sup> the court did, however, sustain jurisdiction because of the presence of a federal question involving a claim in excess of \$10,000.<sup>28</sup> These jurisdictional holdings were, essentially, applications of existing doctrine.<sup>29</sup>

It is in the area of the scope of its jurisdiction under the Mandamus Act that the court displayed initiative.<sup>30</sup> Since the passage of the Mandamus Act in 1962, the various circuits have not agreed upon the extent of

26. 5 U.S.C. § 702 (1970). For the text of the statute *see* note 9 *supra*.

27. This holding was predicated upon the earlier Third Circuit decision in *Zimmerman v. United States*, 422 F.2d 326 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970), wherein the court held that the Administrative Procedure Act could not serve as an independent basis for jurisdiction. The rationale for this decision was that that act provides remedies only in cases that come within federal jurisdiction under other statutes. *Id.* at 330-32. *Accord*, *PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718 (3d Cir. 1973), *noted herein*, 20 VILL. L. REV. \_\_\_\_\_ (1974).

28. 494 F.2d at 1327-28, *citing* 28 U.S.C. § 1331 (1970). For the text of the statute, *see* note 10 *supra*. Since the question of the propriety of the plaintiff's discharge involved an interpretation of a federal statute, the National Guard Technicians Act of 1968, the case was one which "arose under the Constitution, laws, or treaties of the United States" and hence proper subject matter for a federal court. 28 U.S.C. § 1331(a) (1970). For the text of the Technicians Act and a discussion of the statutory interpretation issue, *see* note 46 and accompanying text *infra*. In dealing with other subissues under the federal question provision, the court agreed with the plaintiff that his damages could exceed \$10,000 and also considered, pursuant to a sua sponte request to counsel to brief the question, the crucial threshold issue of whether judicial review of the Adjutant General's action was precluded by an express provision in the National Guard Technicians Act of 1968. Section 709(e) of that act provides, in pertinent part:

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

....  
(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

....  
(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned....

32 U.S.C. § 709(e)(3), (5) (1970). The court concluded that the Congress' intent in the above provision was to limit administrative appeals to the level of the adjutant general of the state, but not to preclude judicial review. 494 F.2d at 1327-28 n.5.

29. *See* note 27 *supra*; H.M. HART & H. WECHSLER, *supra* note 21, at 844-50.

30. For the text of the statute, *see* note 12 *supra*. Prior to its discussion of the scope of authority granted by section 1361, the court considered another important threshold issue: The Mandamus Act allows an action in the nature of mandamus against "an officer or employee of the United States or any agency thereof." 28 U.S.C. § 1361 (1970) (emphasis added). The question was whether a state adjutant general was one of those three entities. Clear precedent showed that he was not an officer of the United States, since he had not been called into active service. 494 F.2d at 1329. Additionally, it was apparent that the Adjutant General was a state employee and not a federal employee. 494 F.2d at 1329. The court decided, however, that since a United States statute, 32 U.S.C. § 709 (1970), gave state adjutants general authority for the employment and administration of National Guard technicians, who were federal employees, the adjutants general thereby became agents or agencies of the United States, thereby falling within the ambit of section 1361. 494 F.2d at 1329.

authority granted by the Act.<sup>31</sup> The question has arisen with respect to the authority of the federal courts to review discretionary decisions by public officials. *Chaudoin* was the first Third Circuit case to venture into this area of judicial power under the Mandamus Act. The rationale of the court's finding of jurisdiction consisted entirely of excerpts from two other decisions.<sup>32</sup> First, the court quoted dicta from *Davis v. Shultz*,<sup>33</sup> an earlier Third Circuit case recognizing authority in the federal courts to review discretionary actions of United States officials. The court then quoted *Leonhard v. Mitchell*,<sup>34</sup> in which the Second Circuit held that it had authority under section 1361 to review abuses of official discretion, although it upheld the official's act upon the facts of that case.<sup>35</sup> Solely upon the basis of these two excerpts, the *Chaudoin* court summarily concluded that it had the authority under the Mandamus Act to review and thereafter correct discretionary actions taken by officers, agencies, or employees of the United States if it were determined that discretion had been abused.<sup>36</sup>

Having established this basis for jurisdiction, the court proceeded to consider the circumstances surrounding the plaintiff's ouster by Adjutant General Atkinson to determine if that dismissal was an abuse of discretion.<sup>37</sup> The court began by examining the guidelines which should have governed the Adjutant General's decision, in an attempt to fix the parameters for that decision. The court first considered the punishment guidelines provided by the *National Guard Regulations (Regulations)*.<sup>38</sup> The *Regulations*

31. The First and Second Circuits have agreed with the *Chaudoin* court that the Mandamus Act confers jurisdiction to review abuses of discretion. See notes 33-34 and accompanying text *infra*. The District of Columbia Circuit has also agreed. See *Peoples v. United States Dep't of Agr.*, 427 F.2d 561 (D.C. Cir. 1970). Prior to the instant case, the Third Circuit had been inconsistent. The *Chaudoin* court quoted dicta from *Davis v. Shultz*, 453 F.2d 497 (3d Cir. 1971), to support its view, but in *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972), a case ignored by the instant court's opinion, a different Third Circuit panel adhered to the ministerial-discretionary limitation. *Id.* at 849-50. The Ninth Circuit, in *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969), and the Tenth Circuit, in *Prairie Band of Pottawatomie Tribe v. Udall*, 355 F.2d 364, 367 (10th Cir. 1966), have also interpreted section 1361 under the traditional mandamus rule of judicial noninterference with discretionary actions.

32. 494 F.2d at 1329-30.

33. 453 F.2d 497 (3d Cir. 1971). In *Davis*, Judge Van Dusen, reviewing the decisions under section 1361, included language from *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965), which permitted federal judicial review of official discretion under section 1361. 453 F.2d at 502. That language was unnecessary to the holding in *Davis*, however, since the plaintiff in that case had alleged the failure of a government official to perform a mandatory duty, and the court held that it had no jurisdiction under section 1361 because the alleged duty was not mandatory. *Id.* at 503.

34. 473 F.2d 709 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973). See note 53 and accompanying text *infra*.

35. 473 F.2d at 714.

36. 494 F.2d at 1329-30.

37. *Id.* at 1330.

38. The *National Guard Regulations* (N.G.R.) are published by the Defense Department and distributed to the various National Guard units. They are unavailable in the *Code of Federal Regulations*. For this reason, subsequent citations will be to the appropriate regulation and to the page number of the *Chaudoin* decision where it appears.



were promulgated by the Secretary of the Army pursuant to authority granted in the National Guard Technicians Act<sup>39</sup> in order to implement the provisions of that enabling statute. Although the enabling statute is phrased in terms which permit an adjutant general to terminate a technician "for cause,"<sup>40</sup> the *Regulations* made it clear that, since this was Chaudoin's first offense,<sup>41</sup> his punishment should have been, at most, a suspension for some brief period of time.<sup>42</sup> The court attached importance to the fact that Chaudoin's immediate superiors had recommended that he be given only 3 days' leave without pay.<sup>43</sup> Additionally, the court noted that a Technician Hearing Board had agreed with Chaudoin's immediate superiors and had recommended to the Adjutant General that the dismissal be set aside.<sup>44</sup> The court found that the Adjutant General's total disregard of the recommendations of the hearing board, the plaintiff's supervisors, and the *Regulations*, without any statement of his reasons for having done so, constituted an abuse of discretion.<sup>45</sup> Based upon this finding, the court directed the district court to grant a writ of mandamus requiring the Adjutant General to reinstate Chaudoin to the position from which he had been dismissed.<sup>46</sup>

39. 32 U.S.C. § 709(a) (1970). See note 1 *supra*.

40. The statute provides in pertinent part:

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned . . . .

32 U.S.C. § 709(e) (3) (1970).

The N.G.R. define "cause" as follows:

A "cause" for an adverse action is a recognizable offense against the employer-employee relationship. What constitutes a proper cause, therefore, may run the entire gamut of such offenses, including inadequate performance of duties and improper conduct on or off the job. In addition, every adverse action must be for such cause "as will promote the efficiency of the service."

494 F.2d at 1330, quoting N.G.R. 51, § 7-39(d).

41. 494 F.2d at 1331.

42. The recommended punishments for the plaintiff's offense are:

Offense. 1. Insubordination (refusal to obey orders, impertinence, like offense). Penalties. First offense. Official written reprimand or 1-day suspension. Second offense. 2 to 5-day suspension. Third offense. 6 to 10-day suspension, or removal.

494 F.2d at 1331, quoting N.G.R. 51, § 7-37.

43. 494 F.2d at 1331. See note 42 *supra*.

44. *Id.* The hearing board, consisting of one enlisted man and four officers of the National Guard Unit, was convened at Chaudoin's request pursuant to the procedure outlined in N.G.R. 690-2, § 7-47. Civil No. 4197 at 3.

45. 494 F.2d at 1331.

46. *Id.* at 1332. The court also found that the order for the plaintiff to perform firing squad duty was illegal. *Id.* Because of this finding the court was able to order the award of the injunctive and monetary relief which plaintiff had also demanded. *Id.* at 1327. This theory of relief from unauthorized state or agency action traces its origins to *Ex parte Young*, 209 U.S. 123 (1908), in which the Supreme Court held that the federal courts had the power to enjoin enforcement of a state law by the state's attorney general when such enforcement would result in a deprivation of a constitutional right. *Id.* at 148-49. A later case, *Philadelphia Co. v. Stimson*, 223 U.S. 605, 607 (1912), extended this rationale to suits against federal officers. These cases established the doctrine that a plaintiff is entitled to judicial review of, and injunctive relief from, treatment accorded him by a governmental officer, although the officer had acted in his official capacity, if it is determined that the officer thereby had exceeded the scope of his authority. See ATTORNEY GENERAL'S COMMISSION ON

This treatment of the Adjutant General's action as an abuse of discretion under the Mandamus Act is novel, at least in the Third Circuit. The court's close analysis of the facts surrounding the plaintiff's discharge and its independent determination of whether those facts justified the discharge followed a pattern similar to that established in government employee reinstatement cases by the District of Columbia Circuit.<sup>47</sup> In its examination of all the circumstances attending Chaudoin's discharge, the court displayed the same fact sensitivity and disregard for arbitrary conclusions that the District of Columbia Circuit had employed in the reinstatement cases.<sup>48</sup> Hence, the Third Circuit in its disposition of *Chaudoin*

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ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 80-81 (1941). A plaintiff who successfully proves conduct by the defendant official which is not justified under the statute giving the official authority to act, and who can prove financial harm, is also entitled to money damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401, 2671-80 (1970). See *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Dalehite v. United States*, 346 U.S. 15 (1953). See also K. DAVIS, *supra* note 20, § 25.03.

The official job description in effect at the time of Chaudoin's offense contained the phrase "[p]erforms other duties as assigned." *Id.* at 1332. See Appendix, *id.* at 1334, quoting DEPARTMENTS OF THE ARMY AND THE AIR FORCE NATIONAL GUARD BUREAU, TECHNICIAN POSITION DESCRIPTION. In meeting the contention that this phrase legally permitted the assignment of the plaintiff to firing squad duty, the court observed that the predecessor of the National Guard Technicians Act of 1968 had contained a description of civilian technicians' general duties, "other duties that do not interfere with the performance of his duties as caretaker." National Guard Act of 1956, ch. 7, § 709(a), 70A Stat. 615 (emphasis added). See 494 F.2d at 1331. However, this section was modified in the 1968 act to delete entirely the language emphasized above. H.R. REP. NO. 1823, 87th Cong., 2d Sess. (1962). See also 494 F.2d at 1332 n.9. Therefore, the court found that, although the National Guard had not amended Chaudoin's job description as of the time of his offense, the order to perform the funeral detail was not legal, "since the explicit authorization of such unrelated duties was eliminated." *Id.* at 1332. Having concluded that the funeral detail order was not lawful, the court proceeded logically to infer that all the consequences which had befallen Chaudoin as a result of this illegal order constituted an indefensible wrong to him, and therefore ordered the district court to award damages and injunctive relief. *Id.*

47. See *Byse & Fiocca*, *supra* note 17, at 342. Because, as noted above (see note 20 and accompanying text *supra*), the District of Columbia federal courts have long held the authority to issue writs of mandamus against agencies, officers, and employees of the United States; and because of the large number of federal employees within that jurisdiction, there have been numerous government employee reinstatement cases in that circuit. *Byse & Fiocca*, *supra* note 17, at 341-44.

Essentially, the District of Columbia Circuit's approach requires an examination of the evidence brought forward by the Government to justify the plaintiff-employee's dismissal and a determination of whether there was "supporting" or "substantial" evidence to justify the decision to discharge, an approach consonant with the well-established rule for judicial review of administrative agency action. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Columbian Enam. & Stamp Co.*, 306 U.S. 292 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). The "substantial evidence" standard of judicial review is also that embodied in the Administrative Procedure Act. 5 U.S.C. § 706 (1970). See K. DAVIS, *supra* note 22, at § 29.02. While the *Chaudoin* court did not enunciate a "supporting" or "substantial" evidence test, it appears nonetheless that its procedure essentially tracked that of the District of Columbia Circuit. See notes 38-46 and accompanying text *supra*.

48. In asserting its authority to review abuses of official discretion under the Mandamus Act, the *Chaudoin* court simply adopted *in toto* the rationale of other

achieved the goal sought by the drafters of the Mandamus Act, and did so by following the tradition of review of discretionary official action established by the District of Columbia Circuit.<sup>49</sup> It is submitted that the Third Circuit's assertion of authority under the Mandamus Act to review discretionary actions and the court's concomitant rejection of the ministerial-discretionary limitation constituted a decision to follow the path of enlightened modern authority. Professor Davis has stated that the ministerial-discretionary distinction has "no affirmative justification" and "has proved unworkable."<sup>50</sup> It is true that certain of the circuits have, to date, refused, upon the grounds of traditional judicial restraint, to abandon the ministerial-discretionary limitation;<sup>51</sup> yet the First, Second, and now the Third Circuits have followed the commentators and the District of Columbia Circuit in refusing to accede to that limitation when the facts have indicated that discretion had been abused. While there has been no decision by the Supreme Court upon the scope of the Mandamus Act,<sup>52</sup> the present disagreement among the circuits might prompt a resolution by the Court. Such a decision should agree with *Chaudoin*, since, it is submitted, the Third Circuit has adopted the more rational and useful interpretation of the Mandamus Act.<sup>53</sup>

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circuits as authority for the proposition that federal court jurisdiction under the Mandamus Act extends to review of discretionary actions. See notes 33 & 34 and accompanying text *supra*.

49. Perhaps the best authority upon which to found such a conclusion is provided by the extensive analysis provided this area in Byse & Fiocca, *supra* note 17. Professors Byse and Fiocca therein review the Mandamus Act in detail and do so with some authority, as Professor Byse coauthored the Act. *Id.* at 308. Indeed, the cases relied upon by the Third Circuit were expressly premised upon that article. See, e.g., *Leonhard v. Mitchell*, 473 F.2d 709, 713 (2d Cir. 1973). Another such case, decided before the article was written, cited Professor Byse' earlier work, Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962), cited in *Ashe v. McNamara*, 355 F.2d 277, 279 (1st Cir. 1962). See notes 33 & 34 and accompanying text *supra*.

50. K. DAVIS, *supra* note 22, § 23.06, at 450-51.

51. See cases discussed in note 31 *supra*.

52. Although the Supreme Court has not yet faced this issue, it is perhaps relevant to mention that at least one Justice has taken note of recent developments. In *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974), Mr. Justice Brennan stated:

Although I am in agreement that the legislative history of the Amtrak Act provides a clear and convincing expression of Congress' intent to preclude any except the Attorney General and in certain situations an employee or his duly authorized representative from maintaining an action under the Act against petitioners, I would leave open the question whether a private suit for mandamus under 28 U.S.C. § 1361 might be maintained against the Attorney General if his refusal to act under § 307 — even though within the letter of his authority — went "beyond any rational exercise of discretion."

*Id.* at 465 (Brennan, J., concurring), quoting *United States ex rel. Schonbrun v. Commanding Officer, Armed Forces*, 403 F.2d 371, 374 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969), and citing Byse & Fiocca, *supra* note 17.

53. The utility lies in the ability of courts in the Third Circuit now to review acts of official discretion formerly unreviewable. Since the National Guard Technicians Act, for example, expressly reserves discretion in firing to the relevant adjutant general, 32 U.S.C. § 709(a) (1970), (see note 40 *supra*), there would be no federal

To keep with the traditional rule in writ of mandamus cases, the court could have simply repeated the ministerial-discretionary litany and denied relief. Instead of placing Third Circuit plaintiffs in this *cul-de-sac*,<sup>54</sup> however, the *Chaudoin* court resolved the dilemma by allowing the assertion of an abuse of discretion claim in federal court. Although it is quite possible that future Third Circuit decisions may limit the *Chaudoin* principle to reinstatement cases, or, even more severely, to federal civilian employee reinstatement cases, it is hoped that this will not occur, because *Chaudoin* is clear authority for judicial review of any abuse of agency or official discretion; and federal courts within the Third Circuit should implement that authority.

R. L. Sebastian

FEDERAL CIVIL PROCEDURE — RULE 4(e)(2) — ATTACHMENT  
BORROWING PROVISION HELD NOT TO INCLUDE STATE VENUE  
REQUIREMENTS.

*FDIC v. Greenberg* (1973)

The Federal Deposit Insurance Corporation (FDIC) brought suit<sup>1</sup> in the United States District Court for the Eastern District of Pennsylvania to set aside the transfer of real and personal property from FDIC's debtor to the defendant, a Massachusetts resident.<sup>2</sup> In an effort to obtain quasi

question jurisdiction for a review of discretionary firings, absent such illegality as there was in the instant case, since there would be no cause to interpret a federal statute. 28 U.S.C. § 1331(a) (1970). Likewise, under the restrictive reading given section 10 of the Administrative Procedure Act by the Third Circuit, jurisdiction could not be founded thereupon. See note 27 *supra*. Hence, *Chaudoin* affords a previously remediless plaintiff a right to review under the only available alternative, the Mandamus Act.

One must note, however, that since the Third Circuit views "government employee discharges" as a distinct class of cases, the effect of the instant decision may be limited thereto unless there is, in a given case, an express statutory grant of jurisdiction. See *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969).

54. See note 53 *supra*.

1. Suit was commenced pursuant to the Federal Deposit Insurance Act § 9, 12 U.S.C. § 1819 (1970), which grants to the United States district courts original subject matter jurisdiction over any case arising under the laws of the United States to which FDIC is a party, regardless of the amount in controversy. *FDIC v. Greenberg*, 487 F.2d 9, 10 (3d Cir. 1973).

2. *FDIC v. Greenberg*, 52 F.R.D. 240 (E.D. Pa. 1971). The merits of the controversy were not before the district court. In its complaint, the plaintiff alleged that its debtor had entered into an agreement of sale with his joint venturers whereby he agreed to purchase their interests in various parcels of real property located in Montgomery and Philadelphia Counties. To assure performance, the debtor delivered to

in rem jurisdiction, the plaintiff caused a writ of foreign attachment to be issued in Philadelphia County, Pennsylvania, against the transferred property,<sup>3</sup> which consisted of three tracts of real estate located in Montgomery County, Pennsylvania, one tract of real estate located in Philadelphia County, and 500 shares of capital stock.<sup>4</sup>

The district court granted a pretrial motion to vacate the attachments upon the Montgomery County real estate and the shares of stock,<sup>5</sup> being of the opinion that the borrowing provision of Federal Rule of Civil Procedure 4(e)(2)<sup>6</sup> had not been met because of the plaintiff's failure to satisfy Pennsylvania Rule of Civil Procedure 1254,<sup>7</sup> which sets the venue for the issuance of writs of foreign attachment.<sup>8</sup> The Third Circuit reversed in part and affirmed in part, *holding* that rule 4(e)(2), which provides for service of process in quasi in rem actions in compliance with the statute or rule of the state in which the district court is held, does not require adherence to state venue requirements.<sup>9</sup> *FDIC v. Greenberg*, 487 F.2d 9 (3d Cir. 1973).

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ments of his interest in the capital stock of a corporation owned by the debtor and his joint venturers. Upon the debtor's purported forfeiture, pursuant to both the contract of sale and the escrow agreement, the deeds for the property and the assignments were conveyed to the defendant acting as trustee for the joint venturers. It was this transaction the plaintiff wished to set aside. *Id.* at 241-42.

3. *Id.* at 242.

4. 487 F.2d at 10. At the time of the district court's order, neither the defendant nor the plaintiff knew the location of the stock certificates. The stock certificates were subsequently located in Massachusetts. *Id.* at 14. See note 9 *infra*.

5. 52 F.R.D. at 241.

6. Rule 4(e) provides in pertinent part:

Whenever a statute or rule of court of the state in which the district court is held provides . . . (2) for service upon or notice to [a party not an inhabitant of or found within the state in which the district court is held] to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

FED. R. CIV. P. 4(e).

7. The proper venue for a Pennsylvania court's issuance of writs of foreign attachment is governed by Pennsylvania Rule of Civil Procedure 1254, which provides:

(a) An attachment against personal property of the defendant may be issued in and only in a county in which

- (1) the property is located, or
- (2) a garnishee may be served.

(b) An attachment against real property of the defendant may be issued in and only in a county in which all or any part of the property is located.

PA. R. CIV. P. 1254.

8. 52 F.R.D. at 242. The defendant also attacked the attachment of the stock because the certificates had not been actually seized. The district court declared that it was unnecessary to make a determination upon that ground since improper venue alone would mandate vacation of the attachments. *Id.* at 243. Literal compliance with the state venue requirements, in this instance, was impossible. As stated above, the real property, upon which the attachment was vacated, was situated in Montgomery County, Pennsylvania. United States District Court is not held in that county. See 28 U.S.C. § 118(a) (1970).

9. The Third Circuit affirmed the lower court's vacation of the attachment of the shares of capital stock not because of improper venue, but because the certificates

Prior to 1963, federal district courts could not exercise<sup>10</sup> quasi in rem jurisdiction<sup>11</sup> unless the action had originated in a state court<sup>12</sup> and had been properly removed to the district court.<sup>13</sup> In 1963, the Federal Rules of Civil Procedure were amended<sup>14</sup> to permit the institution of quasi in rem actions in the district courts.<sup>15</sup>

Rule 4(e) presently allows the district courts to assert original quasi in rem jurisdiction if the rule or statute of the state in which the district court is held provides for service or notice to a defendant to appear because of an attachment or garnishment of his property.<sup>16</sup> The question of whether

had been located in Massachusetts, so that attachment by a court sitting in Pennsylvania would be improper. 487 F.2d at 13-14.

In Pennsylvania, a share of stock cannot be attached unless it is physically seized. This procedure is mandated by section 8-317(1) of the Uniform Commercial Code — Investment Securities, which provides:

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy . . . .

PA. STAT. ANN. tit. 12A, § 8-317(1) (1970). Since, in the instant case, the stock certificates had not been located in Pennsylvania, the court had lacked jurisdiction over them; hence, the attachments were properly vacated. See *Nederlandsche Handel-Maatschappij v. Sentry Corp.*, 163 F. Supp. 800 (E.D. Pa. 1958). See also 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1071, at 274 (1971); Note, *Attachment of Corporate Stock: The Conflicting Approaches of Delaware and the Uniform Stock Transfer Act*, 73 HARV. L. REV. 1579 (1960).

10. See, e.g., *Big Vein Coal Co. v. Read*, 229 U.S. 31 (1913) (defendant's property not subject to attachment in action originating in federal court unless personal jurisdiction could be exercised over defendant); *Davis v. Ensign-Bickford Co.*, 139 F.2d 624 (8th Cir. 1944) (federal district courts could not acquire jurisdiction over defendant by means of attaching defendant's property).

11. Quasi in rem jurisdiction may be generally defined as the power of a court to adjudicate a personal claim or claims by virtue of the attachment, garnishment, or seizure of the defendant's property located within the court's jurisdiction. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 75 (Tent. Draft No. 1, 1973).

12. An action which had been begun in a state court by means of attaching or garnishing the defendant's property could have been removed to a United States district court under 28 U.S.C. § 1450 (1970), which states:

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

*Id.*

13. Removal of cases from the state court to federal district courts is authorized by 28 U.S.C. §§ 1441-51 (1970).

14. Prior to amendment, rule 4(e) read as follows:

Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by statute, rule, or order.

FED. R. CIV. P. 4(e), 308 U.S. 666-67 (1939). For the relevant current text of rule 4(e) see note 6 *supra*.

15. See Advisory Comm. Notes, 31 F.R.D. 621, 627-28 (1962). The purpose of the 1963 amendment to rule 4(e) was to conform state and federal practice by allowing the federal plaintiff the use of "familiar state procedure" for the institution of a law suit by means of attachment or garnishment, and to make federal jurisdiction in original and removed cases compatible. *Id.* See also Currie, *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337 (1961).

16. See Advisory Comm. Notes, 31 F.R.D. 621, 627-28 (1962).

rule 4(e) requires the adoption of state venue limitations was answered affirmatively in *Dunn v. Printing Corp. of America*,<sup>17</sup> wherein a Pennsylvania resident brought suit in the Eastern District of Pennsylvania for breach of contract against a corporation having its principal place of business in New York.<sup>18</sup> Pursuant to rule 4(e)(2), writs of foreign attachment were issued upon seven garnishees, only two of whom were located in the county where the district court was held and from which the writs issued.<sup>19</sup> The district court ordered the other five garnishments vacated for failure to comply with the Pennsylvania venue requirements for the issuance of writs of attachment.<sup>20</sup>

In the instant case, the Third Circuit found implicit in the district court's decision the assumption that rule 4(e)(2) embraced Pennsylvania venue limitations upon quasi in rem actions.<sup>21</sup> While the court agreed with the district court that the issuance of the writs of attachment in Philadelphia County contravened these venue rules for the issuance of writs of foreign attachment upon the Montgomery County property,<sup>22</sup> it rejected the lower court's view that such a violation mandated its vacating the attachments.<sup>23</sup> Instead, the Third Circuit stated that rule 4(e)(2) related only to service of process<sup>24</sup> and only "borrows methods of *service* employed in state quasi in rem proceedings."<sup>25</sup> The court noted that service of process and venue were distinct concepts,<sup>26</sup> and since Pennsylvania Rule of Civil Procedure

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17. 245 F. Supp. 875 (E.D. Pa. 1965).

18. *Id.* at 877.

19. *Id.*

20. *Id.* at 879.

21. 487 F.2d at 11.

22. *Id.* It should be noted, that in recognizing the issuance of writs of foreign attachment for the real estate located in Montgomery County from Philadelphia County as a violation of Pennsylvania Rule of Civil Procedure 1254, the *Greenberg* court lent support to the interpretation of the venue rule that was used by the district court. The plaintiff argued that it had complied literally with Pennsylvania Rule of Civil Procedure 1254(b). This contention was based upon the fact that one of the four tracts of attached real estate was located in Philadelphia County, the county from which the writs of foreign attachment were issued; therefore, the provision that the writ must be issued in the county "in which all or any part of the property is located" had been satisfied. The district court found no merit in this proposition. 52 F.R.D. at 243. The district court interpreted that part of Pennsylvania Rule of Civil Procedure 1254(b) to provide for situations wherein a single tract of land extended over more than one county. If such be the case, a writ of attachment may be properly issued in any county in which a portion of the land is situated. *Id.* For a further discussion of Pennsylvania rule 1254(b), see P. AMRAM & M. FELDMAN, GOODRICH-AMRAM PENNSYLVANIA PROCEDURAL RULES SERVICE 64 (1955).

23. 487 F.2d at 11.

24. *Id.* at 12.

25. *Id.* (emphasis supplied by the court). Federal Rule of Civil Procedure 4 delineates federal procedure for the service of process. For a general discussion of service of process under rule 4, see 2 J. MOORE, FEDERAL PRACTICE ¶ 4.01-45, at 901-1300 (2d ed. 1974).

26. 487 F.2d at 12. The court characterized the difference:

Service of process, a prerequisite of jurisdiction, relates to the power of a court to adjudicate. Venue, on the other hand, is a limitation on the exercise of that power relating to the locality of the lawsuit.

1254 was not concerned with service of process, but only with venue, the court concluded that it, like all other state rules not dealing with service of process,<sup>27</sup> had not been incorporated into federal procedure by rule 4(e)(2).<sup>28</sup>

The Third Circuit based its conclusion that rule 4(e)(2) did not require adherence to state venue limitations upon two propositions: first, that the venue of a federal court action was determined by federal law,<sup>29</sup> and therefore was not subject to state control;<sup>30</sup> and second, that rule 4(e)(2) was a statement of procedure concerned only with service of process and not venue,<sup>31</sup> and had the Supreme Court and Congress wished to restrict federal venue law they would have expressed their intent more clearly.<sup>32</sup>

As to the issue of the proper venue in quasi in rem proceedings originating in federal courts, the Third Circuit indicated that federal law controlled.<sup>33</sup> Therefore, the court found this suit to set aside the transfer of property to be a local action,<sup>34</sup> and determined that the "plain inference" of the federal statute which sets venue in local actions<sup>35</sup> was that where the attached property is located in only one district, proper venue is that district.<sup>36</sup>

The instant case afforded the Third Circuit an opportunity to scrutinize the *Dunn* decision, which the district court relied upon heavily.<sup>37</sup> The *Dunn* court had based its decision to construe rule 4(e)(2) as requiring adherence to state venue limitations upon two considerations: the possibility of prejudice to the nonresident defendant<sup>38</sup> and the questionable utility<sup>39</sup> of the quasi in rem procedure.<sup>40</sup>

27. *See id.* at 13.

28. *Id.*

29. The venue for various types of actions heard in the federal courts is determined by federal statute. *See* 28 U.S.C. §§ 1391-1407 (1970).

30. 487 F.2d at 12. *Accord* McCoy v. Siler, 205 F.2d 498 (3d Cir.), *cert. denied*, 346 U.S. 872 (1953); Stuart v. Al Johnson Constr. Co., 236 F. Supp. 126 (W.D. Pa. 1964) (Pennsylvania Rules of Civil Procedure relating to venue were inapplicable in a federal diversity action insofar as the state rules conflicted with federal venue statute).

31. 487 F.2d at 12.

32. *Id.* In support of this proposition, the court cited Federal Rule of Civil Procedure 82, which states in part:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

FED. R. CIV. P. 82.

33. 487 F.2d at 12. For the applicable federal venue statutes, *see* note 29 *supra*.

34. 487 F.2d at 12 n.9. A suit to set aside the transfer of property is a "local action." *Collet v. Adams*, 249 U.S. 545 (1919). A "local action" is one which must be brought in the district in which the subject of the suit is located. *Pellerin Laund. Mach. Sales Co. v. Hogue*, 219 F. Supp. 629, 637 (W.D. Ark. 1963). For a more detailed discussion *see* 1 J. MOORE, *supra* note 25, ¶ 0.142, at 1455.

35. 487 F.2d at 12 n.9. Federal venue in a local action is determined by 28 U.S.C. § 1392(b) (1970).

36. 487 F.2d at 12 n.9. *Accord*, *Pellerin Laund. Mach. Sales Co. v. Hogue*, 219 F. Supp. 629 (W.D. Ark. 1963).

37. 52 F.R.D. at 242.

38. 245 F. Supp. at 878-79.

39. *See text accompanying note 47 infra*.

40. 245 F. Supp. at 879.



The *Greenberg* court answered the argument of possible prejudice to the nonresident defendant by suggesting that if there were any prejudice, it would be no greater in a quasi in rem proceeding than in an ordinary diversity action.<sup>41</sup> The court dismissed the second contention, that the quasi in rem device was of questionable utility, by saying:

We are not persuaded by the *Dunn* reasoning . . . . As to the questionable utility of quasi-in-rem proceedings, this is a matter of legislative, and not judicial, concern.<sup>42</sup>

It is submitted that the Third Circuit cogently perceived *Dunn* as an evisceration of the 1963 amendment to rule 4(e)(2),<sup>43</sup> but in rejecting *Dunn* it failed to confront directly the issue of the potential unfairness inherent in the use of the quasi in rem procedure.<sup>44</sup>

There appear to be two possible interpretations of *Dunn*. The first, the one seemingly accepted by the Third Circuit, is that the decision was a thinly concealed attempt to limit the exercise of quasi in rem jurisdiction in the federal courts. However, a second view would be that the *Dunn* court may have been attempting to ameliorate what it viewed as the potentially unfair effects of quasi in rem procedure<sup>45</sup> as a means of effecting service of process. It may be forcefully contended, when, as in the instant case, real property is involved, that the possibility of attachment is an incident of property ownership. Conversely, it may be argued that it is not always fair to require a party to litigate wherever its property is located. Professor Carrington has suggested the following argument: Quasi in rem jurisdiction will normally be resorted to by a plaintiff who is unable to obtain in personam jurisdiction. If the standard for the exercise of personal jurisdiction is whether the defendant maintains such minimum contacts with the forum that requiring him to defend in it is not unfair,<sup>46</sup> frequently quasi in rem jurisdiction will be invoked when it is not fair to require that particular defendant to litigate in the forum state.<sup>47</sup>

While the *Greenberg* court found no prejudice in the use of this procedure, this blanket denial should not obscure recognition of the fact that sensitivity to the problem raised by the *Dunn* court does not necessarily mandate acceptance of the method employed in that decision to avoid the

41. 487 F.2d at 13.

42. *Id.*

43. C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS 272 (2d ed. 1970).

44. See text accompanying note 47 *infra*.

45. See C. WRIGHT & A. MILLER, *supra* note 9, § 1121, at 501-03. For discussion of the possible detrimental effect of the use of quasi in rem procedure see text accompanying note 47 *infra*.

46. International Shoe Co. v. Washington, 326 U.S. 310 (1945). See generally C. WRIGHT & A. MILLER, *supra* note 9, §§ 1067-69, at 1073.

47. Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 900 (1962).

possible unjust effect of the quasi in rem procedure. Other, more appropriate procedural devices, may accomplish the same result. For example, Pennsylvania recognizes the application of the doctrine of *forum non conveniens*<sup>48</sup> to actions commenced by the attachment or garnishment of the defendant's property.<sup>49</sup> Under this theory, a state court may decline to hear a case in those instances in which there is available a more convenient forum and great prejudice to the defendant exists.<sup>50</sup> Adoption of *forum non conveniens* would represent a middle ground between the *Dunn* court's fear of unfairness concomitant with quasi in rem procedure,<sup>51</sup> and the *Greenberg* court's aversion to the imposition of unwarranted procedural burdens.<sup>52</sup> However, at present, federal courts probably cannot use the state doctrine in a quasi in rem action because federal *forum non conveniens*<sup>53</sup> is entirely a statutory remedy.<sup>54</sup> Additionally, it is by no means certain that the statute applies to federal quasi in rem actions since a district court is precluded from transferring an action if there is no other district in which it can be

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48. The doctrine of *forum non conveniens* balances the competing interests of the plaintiff's traditional privilege of choosing the place of litigation, and the resulting inconvenience to the defendant of being forced to litigate in the plaintiff's chosen forum. Where another forum is available, a court may, in its discretion, dismiss the case despite the fact that it has jurisdiction over the parties and the subject matter, and venue is proper. See C. WRIGHT, *supra* note 43, at 164-65. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, comment c (1971).

49. *Plum v. Tampax, Inc.*, 402 Pa. 616, 168 A.2d 315, *cert. denied*, 368 U.S. 826 (1961). In *Plum*, a subject of Denmark brought an action in which a writ of foreign attachment was served upon a Pennsylvania garnishee possessing property of the defendant, a foreign corporation. *Id.* at 617-18, 168 A.2d at 315. In ruling that dismissing the complaint under the theory of *forum non conveniens* was not an abuse of judicial discretion although the action was properly instituted by garnishment of the defendant's property, the Supreme Court of Pennsylvania said:

Plaintiff has also contended that the doctrine of *forum non conveniens* should not be applied in actions instituted by writs of foreign attachment since to do so would destroy the efficacy of that remedy. This contention is unfounded. A writ of foreign attachment is nothing more than "the equivalent of a summons for the commencement of a personal action . . ." Upon obtaining jurisdiction over the person of appellee, as occurred in this case, the question of whether the doctrine of *forum non conveniens* should be applied is the same as in any other case instituted by summons or by complaint.

*Id.* at 619, 168 A.2d at 317 (citation omitted). But see *Root v. Superior Court*, 209 Cal. App. 2d 242, 25 Cal. Rptr. 784 (2d Dist. 1962) (questioning whether the doctrine of *forum non conveniens* can be invoked when court is exercising quasi in rem jurisdiction).

50. See text accompanying note 47 *supra*.

51. See note 38 and accompanying text *supra*.

52. See text accompanying note 43 *supra*.

53. The federal *forum non conveniens* statute provides in pertinent part:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a) (1970). For detailed discussion of section 1404(a) see C. WRIGHT, *supra* note 43, at 165.

brought.<sup>55</sup> Expansion of this limited doctrine to allow the transfer of quasi in rem actions to avoid prejudice would most likely have to originate in the legislature and not the courts.

*FDIC v. Greenberg* should have the initial impact of discouraging interpretations of rule 4(e)(2) which render the operation of quasi in rem jurisdiction more difficult by unnecessarily applying a plethora of state procedural requirements. It is hoped that by removing the diversionary problem of whether particular state procedures are mandated, the instant case will have the salutary effect of focusing legislative and, possibly, judicial, attention upon the issue of the fairness in certain circumstances of requiring a nonresident defendant to litigate in a particular jurisdiction solely because his property is located within that court's jurisdiction.

Stephen C. Braverman

FEDERAL PROCEDURE — EVIDENCE — VIDEOTAPED INTERROGATION OF INCOMPETENT INADMISSIBLE WHERE TAPE IS NOT ILLUSTRATIVE OR CORROBORATIVE OF EXPERT MEDICAL TESTIMONY, AND AMOUNTS TO HEARSAY AS THE EX PARTE TESTIMONY OF AN INCOMPETENT WITNESS.

*Foster v. Crawford Shipping Co.* (1974)

Plaintiff sued in federal district court to recover damages for personal injuries suffered in an accident while he was unloading defendant's ship.<sup>1</sup> On motion by his attorneys, the court entered an order adjudicating plaintiff incompetent and appointed a guardian ad litem.<sup>2</sup> With the plaintiff absent, the case went to trial with the result that a directed verdict was entered

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55. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). The *Norwood* Court stated:

The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action was eliminated by the provision in § 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification.

*Id.* Thus, in an action commenced by the attachment of the defendant's property, relief under the federal *forum non conveniens* statute would arguably be unavailable since transfer to the district where the action could be brought would be impossible, especially in a local action such as *Greenberg*. But see Comment, *Transfer of Quasi in Rem Actions Under 28 U.S.C. § 1404(a): A Study in the Interpretation of "Civil Action,"* 31 U. CHI. L. REV. 373 (1964), arguing that under certain circumstances section 1404(a) may be used in quasi in rem actions.

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1. *Foster v. Crawford Shipping Co.*, 496 F.2d 788, 790 (3d Cir. 1974).

2. *Id.* Rule 17(c) of the Federal Rules of Civil Procedure, provides that the court shall appoint a guardian ad litem for an incompetent person not otherwise presented in an action. FED. R. CIV. P. 17(c). The same hearing adjudicated him in-

for the plaintiff on the issue of liability.<sup>3</sup> In the trial of the damages issue, plaintiff's expert witness, a physician, gave a diagnosis of severe schizophrenia as a result of the accident<sup>4</sup> and a prognosis of continued deterioration of that condition, with the consequence that he never again would be gainfully employed, that he would need periodic hospitalization, and that he would require monthly visits to a psychiatrist.<sup>5</sup>

During the trial, plaintiff's attorney offered into evidence a 2 minute videotape, taken the previous day, of his interrogation of the partially catatonic plaintiff who answered with grunts and growls.<sup>6</sup> Defendant objected on the grounds that it was made in his absence, and that there was nothing to establish the circumstances surrounding the taping or plaintiff's condition either before or after the taping, both of which were believed to be necessary if the videotape were offered to prove the plaintiff's current condition.<sup>7</sup> He further contended that the prejudicial effect on the jury outweighed the benefits of admission for any purpose for which it was offered.<sup>8</sup> After questioning counsel regarding the purpose for which the videotape was offered,<sup>9</sup> the trial court admitted the videotape, and the jury returned a \$500,000 verdict in favor of the plaintiff.<sup>10</sup>

Defendant's motion for a new trial on the issue of damages, based upon the admission of the videotape and remarks made in summation by plaintiff's counsel,<sup>11</sup> was denied.<sup>12</sup> On appeal, the Third Circuit reversed and remanded, *holding* that the denial of defendant's motion for a new trial was

3. The trial was bifurcated according to rule 42(c) of the Federal Rules of Civil Procedure, which provides for the separate trial. FED. R. CIV. P. 42(c).

4. Plaintiff's theory was that the accident had been the "triggering mechanism" of his condition. 496 F.2d at 790.

5. *Id.* There was testimony establishing a life expectancy of 37 years and a work expectancy of 30 years. *Id.* Defendant's expert witness disputed the causal connection between the accident and the plaintiff's schizophrenia, and rendered a prognosis of periodic remission. *Id.*

6. The videotape was made at plaintiff's home. *Id.*

7. *Id.*

8. *Id.*

9. The exchange between the trial judge and plaintiff's attorney was as follows: (The Court) What is the purpose that you are introducing this?

(Plaintiff's Counsel) I am introducing this strictly to be illustrative of Dr. Dillon's testimony. It has no greater purpose than a chart that a doctor would use to talk about his testimony. It has no greater purpose than a schedule [*sic* — skeleton] to know what a doctor would use to explain a broken bone . . . and this is illustrative of his present condition.

(Plaintiff's Counsel) I think the jury may have some question as to what he is really like, and . . . that weighs heavily in favor of showing it to the jury because they have never seen Mr. Foster.

*Id.* at 790-91.

10. *Id.* at 790.

11. Plaintiff's counsel made remarks concerning the financial disparity of the parties, the fact that defendant as a foreign corporation, and that, if the defendant did not pay for the injuries to the plaintiff, the taxpayers would. *Id.* at 792.

12. *Id.* at 793.

inconsistent with substantial justice<sup>13</sup> in that 1) in reference to the tape it was unauthenticated and not illustrative or corroborative of the expert witness's testimony; it was communicative and therefore amounted to hearsay; and the tape would have been prejudicial even if it were offered for an admissible purpose; and 2) the closing remarks of counsel for the plaintiff were improper. *Foster v. Crawford Shipping Co.*, 496 F.2d 788 (1974).

Courts have considered photographs and motion pictures,<sup>14</sup> and, more recently, videotapes<sup>15</sup> as demonstrative evidence, that is, as "[e]vidence from which the trier of fact may derive a relevant firsthand sense impression . . . ."<sup>16</sup> However, the courts have developed three criteria for admissibility, referred to as the foundation, to safeguard the opposing party and the court from deceptive, distorted, or fabricated photographs and videotapes.<sup>17</sup> First, the videotape must be authenticated by a witness who is familiar with the original scene, and who is competent to state that the film accurately represents the person, place, or thing reproduced at the time in issue.<sup>18</sup>

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13. Rule 61 of the Federal Rules of Civil Procedure provides:

No error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict . . . or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. . . .

FED. R. CIV. P. 61.

14. See, e.g., 1 C. SCOTT, PHOTOGRAPHIC EVIDENCE §§ 1291-1334 (2d ed. 1969) [hereinafter cited as SCOTT]; 3 J. WIGMORE, EVIDENCE §§ 790-98 (Chadbourn rev. ed. 1970) [hereinafter cited as WIGMORE]; Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233 (1946); Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235 (1965).

15. See, e.g., *Zollman v. Symington Wayne Corp.*, 438 F.2d 28 (7th Cir.), cert. denied, 404 U.S. 827 (1971) (videotape of a reconstruction of the accident which caused plaintiff's injury). See also Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9 (1972); Kornblum & Rush, *Television in Courtroom and Classroom*, 59 A.B.A.J. 273 (1973).

16. *State v. Newman*, 4 Wash. App. 588, 484 P.2d 473 (1971). See McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 212, at 524-25 (2d ed. E. Cleary 1972) [hereinafter cited as McCORMICK], where the author states that this kind of evidence allows the jury to draw its own conclusion rather than relying solely on the testimony of the witness. See also Hare, *Demonstrative Evidence*, 27 ALA. LAW. 193 (1966); Stewart, *Videotape: Use in Demonstrative Evidence*, 21 DEF. L.J. 253 (1972).

17. See, e.g., McCORMICK, *supra* note 16, at 530. These criteria, which were first developed for photographs, have been applied to motion pictures for the following reason:

As photographs and phonographic reproductions of sounds have been held to be admissible in evidence, there would seem to be no sound reason for refusing to accept a talking motion picture which is but a combination of the two when it is shown to be accurate and reliable.

*Commonwealth v. Roller*, 100 Pa. Super. 125, 130 (1930). It would follow that since the difference between a motion picture and a videotape is a merely technological one, in that a film is recorded on celluloid and a videotape on electromagnetic tape, the same criteria which had been applied to films would be applied to videotapes. SCOTT, *supra* note 14, § 1294, at 152. See *Paramore v. State*, 229 So. 2d 855, 859 (Fla. 1969); *State v. Newman*, 4 Wash. App. 588, 593, 484 P.2d 473, 477 (1971).

18. See, e.g., *Paramore v. State*, 229 So. 2d 855, 859 (Fla. 1969). WIGMORE, *supra* note 14 at § 793. The authenticating witness, however, does not have to be the photographer. *People v. Heading*, 39 Mich. App. 126, 132, 197 N.W.2d 325, 329 (1972). Some courts do require that the witness actually be present during the filming due to the technical aspects of motion pictures. See Annot., 62 A.L.R.2d 686 (1958) and cases cited therein. The film also does not have to be continuous since editing is

Secondly, the videotape must be relevant to the issues by tending to prove or disprove a material fact in question.<sup>19</sup> Third, the videotape must not be excessively prejudicial to the opposing party.<sup>20</sup> In applying all of these criteria, the decisions have emphasized that the determination of admissibility is largely within the discretion of the trial judge.<sup>21</sup>

If the videotape satisfies the criteria, it is admissible for the purpose of illustrating the oral testimony of a witness (as would be a map or anatomical chart), or for the purpose of corroborating, that is, verifying his testimony.<sup>22</sup> However, the videotape, just as a photograph, is only demonstrative evidence. By itself it cannot be admitted into evidence, rather

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allowed so long as the film is not spliced together in a misleading way. *Pritchard v. Downie*, 326 F.2d 323, 326 (8th Cir. 1964); *Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 100 (10th Cir. 1958).

19. See, e.g., *State v. Thurman*, 84 N.M. 5, 7, 498 P.2d 697, 699 (1972); *McCor-mick*, *supra* note 16, at § 185. The videotape, however, does not have to be taken contemporaneously with the occurrence to be relevant, but may be taken afterwards if the conditions are basically the same and any inaccuracies or minor changes are specifically pointed out to the jury and are readily understandable to them. *People v. Mines*, 132 Ill. App. 2d 628, 630, 270 N.E.2d 265, 267 (1971).

The courts are split on whether the videotape may be cumulative of detailed testimony or repetitive of evidence introduced earlier, even when it is offered to illustrate or corroborate a witness' testimony. Compare *Id.* and *State v. Helm*, 66 Nev. 286, 307-08, 209 P.2d 187, 197 (1949) (photograph), *cert. denied*, 339 U.S. 942 (1950), with *Frankel v. Lull Engineering Co.*, 334 F. Supp. 913, 927 (E.D. Pa. 1971) (motion picture), *aff'd*, 470 F.2d 995 (1973) and *Pursche v. Atlas Scraper & Eng'r Co.*, 300 F.2d 467, 489 (9th Cir. 1962) (motion picture).

20. *Wigmore*, *supra* note 14, § 792, at 237. The courts will not admit inflammatory or lurid pictures whose purpose is to elicit sympathy or rage and, thus, enhance plaintiff's verdict or make more certain defendant's conviction if it is a criminal trial. *Ryan v. United Parcel Serv., Inc.*, 205 F.2d 362, 364 (2d Cir. 1953) (photograph of deceased with his head hanging out of a doorway of an automobile depicting blood or an opening in his head not admissible). However, a film or photograph, even if it is gruesome, will be admitted if it is a fair representation of the subject's condition at the time taken, its purpose is not to inflame the jury, and its probative value outweighs any possible prejudice to the other party. *United States v. Odom*, 348 F. Supp. 889, 894-95 (M.D. Pa. 1972), *aff'd mem.*, 475 F.2d 1397 (3d Cir.), *cert. denied*, 414 U.S. 836 (1973) (photograph of deceased depicting stab wounds held admissible since they had not been introduced to inflame the jury).

21. See generally *Scott*, *supra* note 14, at § 1021. The judge may always review the film in his chambers to determine if the film would be inadmissible due to its prejudicial effects. *State v. Newman*, 4 Wash. App. 588, 593, 484 P.2d 473, 477 (1971), *citing Paradis*, *supra* note 14, at 246.

22. *United States v. Odom*, 348 F. Supp. 889, 894 (M.D. Pa. 1972), *aff'd mem.*, 475 F.2d 1397 (3d Cir.), *cert. denied*, 414 U.S. 836 (1973) (photograph); *McCor-mick*, *supra* note 4, at § 214. Although the two purposes are similar, the distinction is crucial. When a photograph is offered to illustrate the testimony of a witness, it may represent an approximation of the object, event, or condition in question, as would, for example, a medical textbook photograph illustrating a plaintiff's condition. However, when the same photograph or videotape is offered to corroborate the witness' testimony, it must represent the actual condition, object, or place in issue and at the time in issue. Thus, in the present case, where the plaintiff's condition was in issue, a videotape of him could have been presented to corroborate the testimony of a witness rather than to illustrate it. If, of course, the videotape is staged, that is, if plaintiff's portraying what his condition was at some other time, then the videotape would be illustrative of the witness's testimony and, if it did not portray plaintiff's actual condition, but would rather be a later dramatization of it.

it must constitute a part of the witness' testimony.<sup>23</sup> The only context in which a film can be introduced into real evidence is when its content is in issue.<sup>24</sup> In a minority of jurisdictions, however, a film will be admitted as a "silent witness" when it has probative value on its own merits.<sup>25</sup> Finding all of these requirements fulfilled, courts have admitted into evidence videotapes of depositions in civil cases,<sup>26</sup> and videotapes of confessions,<sup>27</sup> line-ups,<sup>28</sup> and police investigations<sup>29</sup> in criminal cases.

Videotapes do, however, pose one possible problem if the videotape itself is considered a communication from the subject of the tape, rather than part of the testimony of the witness; in that case, it will be deemed hearsay.<sup>30</sup> This contention was raised with respect to a motion picture in *Richardson v. Missouri-K-T-Ry.*,<sup>31</sup> in which the defendant sought to place into evidence a film depicting a plant foreman operating the machine which had injured the plaintiff.<sup>32</sup> Stating that "[t]he main test to determine whether picture testimony is hearsay is as to whether or not it is subject to cross examination through the witness who verifies and uses it,"<sup>33</sup> the court held that the film, rather than being hearsay, was part of the au-

23. WIGMORE, *supra* note 14, at § 790.

24. *Feeney v. Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (1920) (motion picture), discussed in *Paradis*, *supra* note 14, at 249-51. In an action to recover damages for the exhibition of the plaintiff in the film without her consent, the film had been introduced to identify it as plaintiff's picture. *Id.* at 503, 181 N.Y. Supp. at 482. Thus, a showing that plaintiff had been in the film was necessary to establish plaintiff's cause of action. *Id.*

25. The film or photograph is admitted into evidence independently of the witness' testimony or observation on the theory that, if the accuracy of the photographic equipment and procedure is established, the photograph or film will be accurate and should be admissible just as an X-ray is admissible even though there is no witness to state that it represents the interior of the person's body. *People v. Bowley*, 59 Cal. 2d 855, 382 P.2d 591, 31 Cal. Rptr. 471 (1963) (motion picture); *State v. Goyet*, 120 Vt. 12, 132 A.2d 623 (1957) (photograph). For a discussion supporting this view, see *McCORMICK*, *supra* note 16, at § 214; *Gardner*, *supra* note 14, at 245-46.

26. *Carson v. Burlington Northern, Inc.*, 52 F.R.D. 492 (D. Neb. 1971). See Judicial Conference, *Modernizing Trial Techniques and Management: Audio-Visual Testimony*, 58 F.R.D. 221 (6th Cir. 1972); Thornton, *Expanding Videotape Techniques in Pretrial and Trial Advocacy*, 9 FORUM 105 (1973).

27. *Hendricks v. Swenson*, 456 F.2d 503 (8th Cir. 1972); *Paramore v. State*, 229 So. 2d 855 (Fla. 1969); *State v. Lindsey*, 507 S.W.2d 1 (Mo. 1974). *Newman*, 4 Wash. App. 588, 484 P.2d 473 (1971).

28. *People v. Heading*, 39 Mich. App. 126, 197 N.W.2d 325 (1972); *State v. Newman*, 4 Wash. App. 588, 484 P.2d 473 (1971).

29. *People v. Mines*, 132 Ill. App. 2d 628, 270 N.E.2d 265 (1971) (videotape of dark spots leading from the scene of the crime to the vicinity of defendant's residence).

30. Hearsay evidence has been defined as:

testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court assertor.

*McCORMICK*, *supra* note 16, § 246, at 584 (footnotes and emphasis omitted).

31. 205 S.W.2d 819 (Tex. Civ. App. 1947).

32. The plaintiff had severely injured his hand while operating the machine in defendant's shop. The film purported to demonstrate how the plaintiff's injury could have resulted from his own carelessness. *Id.* at 821-22.

33. *Id.* at 822, citing 3 J. WIGMORE, EVIDENCE § 791, at 178 (3d ed. 1940).

thenticating witness' testimony, which, of course, was subject to cross examination.<sup>34</sup>

In contrast, the court in *State v. Thurman*<sup>35</sup> held segments of a videotape inadmissible as hearsay.<sup>36</sup> In *Thurman* the police had made a videotape of dark spots (allegedly blood) leading from the scene of the crime to the vicinity of defendant's residence.<sup>37</sup> The audio portion of the videotape consisted of a *narration* by a police officer which may have been made after the video portion was recorded.<sup>38</sup> The trial court ordered the hearsay portions of the tape struck from the record and instructed the jury to disregard additional portions of the narration not included in the motion to strike.<sup>39</sup>

The *Thurman* case was not cited by the court in the instant case in support of its finding that the videotape of the catatonic plaintiff amounted to hearsay.<sup>40</sup> Rather, the *Foster* court proceeded by first examining the contention that the tape was corroborative of the expert witness' testimony.<sup>41</sup>

34. 205 S.W.2d at 823. The fact that the actor was also the authenticating witness would not affect the hearsay question, and thus the principle enunciated would apply equally to a situation when the actor is not the authenticating witness.

35. 84 N.M. 5, 498 P.2d 697 (1972).

36. *Id.* at 8, 498 P.2d at 700.

37. *Id.* at 7, 498 P.2d at 699.

38. Implicit in the court's designation of the audio portion as a "narration," was the fact that the audio was not part of what had actually transpired during the taping, but one officer's account or explanation of what had happened which may have very well been added after the video portion was taped. Thus, unlike *Foster*, the audio portion was severable from the tape without affecting what had actually transpired.

39. *Id.* at 8, 498 P.2d at 700.

40. 496 F.2d at 791.

41. The court presented virtually no discussion on the defendant's claims at trial that none of the three criteria of admissibility — authentication, relevancy, lack of prejudice — had been satisfied. It should be noted that no witness had authenticated the videotape at trial. *Id.* On appeal, the plaintiff contended that the defendant had waived this objection by not demanding that someone from the tape crew appear and testify. *Id.* The court summarily rejected this argument, apparently concluding that defendant's objection, that the circumstances surrounding the taping were unknown, sufficed to preserve this objection, for the court merely stated, "This contention misstates the record." *Id.*

In arguing that the tape was relevant, the plaintiff had contended at trial that the jury might have some question as to what the plaintiff was really like, since they had never seen him. *Id.* However, as defendant's counsel at trial and the Third Circuit on review pointed out, neither plaintiff's condition prior to or after the film were disclosed. *Id.* at 790. To be relevant the videotape had to represent the general, continuing condition of the subject since the time in question was more than just the 2-minute taping segment.

On the issue of prejudice, the defendant made his strongest objection to the videotape, claiming that he was absent during the taping and that the tape was highly inflammatory to the jury. *Id.* at 790-91. The trial court had ruled that the videotape was not prejudicial in this former sense and correctly so, as there is only one jurisdiction which recognizes the opposing party's right to be present during a filming. *Balian v. General Motors*, 121 N.J. Super. 118, 296 A.2d 317 (1972) (motion picture), *cert. denied*, 62 N.J. 195, 299 A.2d 729 (1973). *Contra, e.g., Hawkins v. Missouri K & T Ry.*, 36 Tex. Civ. App. 633, 83 S.W. 52 (1904) (photograph). With respect to inflaming the jury, there was no indication in the Third Circuit's opinion that the tape was being used in this manner. The *Foster* court only stated that the tape was



Although the court did acknowledge that corroboration is a permissible purpose by citing *Jenkins v. Associated Transport Inc.*,<sup>42</sup> which held that a photograph of the injured plaintiff was admissible to corroborate the testimony of the doctor who authenticated it and was present when it was taken,<sup>43</sup> it rejected plaintiff's argument here because the videotape contradicted what his expert witness had testified to.<sup>44</sup> The crucial distinction which the court drew between *Jenkins* and the present case was that, even if the tape had corroborated the witness' testimony, the videotape and its soundtrack of the attorney interrogating Foster had a "communicative content other than merely pictorial" and therefore amounted to hearsay.<sup>45</sup>

Anticipating the court's finding that the tape was hearsay, the plaintiff alleged that it was nevertheless admissible under one of two exceptions to the hearsay rule. First, the plaintiff claimed that the well-settled exception of communications to a physician for purposes of treatment<sup>46</sup> was applicable. In response, the court stated that the exception was not appropriate here because the tape had been made outside the presence of the physician for use as testimony.<sup>47</sup> Second, the plaintiff contended that the videotape was admissible even if hearsay under the theory that all conduct establishing insanity can not be denied entry into evidence.<sup>48</sup> Without resolving the issue of whether the tape qualified as evidence of insanity, the court noted that the plaintiff's sanity was not even in issue since he

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prejudicial in the sense that it was ex parte testimony from an absent incompetent. 496 F.2d at 792. Hence, as with the defendant's other challenges to the trial court's conclusions that the various criteria had been met, the *Foster* court apparently chose to rest its analysis on the hearsay issue.

42. 330 F.2d 706 (6th Cir. 1964).

43. *Id.* at 711.

44. The testimony was as follows:

(The Court) Is [the film] illustrative of what you would testify to? Have you seen him in a condition like this?

(The Witness) No sir. . . . [H]e was totally mute and catatonic. He was not making the grunting growling and snarling things at the time I saw him. 496 F.2d at 791.

45. *Id.*

46. This exception to the hearsay rule is firmly established due to the reliability and sincerity of such statements. McCORMICK, *supra* note 16, at § 292.

47. According to the court:

Undoubtedly hearsay communications to a physician for the purposes of obtaining treatment, and possibly videotapes and motion picture recordings of those communications, are admissible as exceptions to the hearsay rule on the theory that the need for accurate diagnosis and treatment and the opportunity to cross examine the physician afford appropriate hearsay safeguards. But that rule is inapplicable to ex parte communications prepared outside the presence of a treating physician for use as testimony.

496 F.2d at 791 (emphasis added).

48. Although sometimes referred to as an exception to the hearsay rule, such conduct is not hearsay. Wigmore states: "The first and fundamental rule, then, will be that any and all conduct of the person is admissible in evidence." 2 WIGMORE, *supra* note 14, § 228, at 9 (original emphasis).

had been judged incompetent; rather, "[t]he issue was the extent of his disability and his prognosis."<sup>49</sup>

Finally, the court rejected plaintiff's argument that the purpose for which the film was introduced was to illustrate the expert's testimony, as would an anatomical chart, on the grounds that this was not the purpose it was used for at all. Instead, the videotape was placed in evidence to establish the plaintiff's condition.<sup>50</sup> Significantly, the court went on to state:

But even if its use had been so restricted, any benefit which might have been derived in the factfinding process by such an illustration was far outweighed by the prejudice of admitting what amounted to *ex parte* testimony from the absent incompetent.<sup>51</sup>

The court was faced with balancing the competing interests of any possible "illustrative" value of the videotape, the subject of which was an incompetent witness, and its testimonial content. If a videotape of an attorney interrogating an incompetent witness was held admissible as illustrating a witness' testimony, it would render the adjudication of a witness as incompetent to testify meaningless. The court in effect limited the trial court's discretion on the issue of prejudice by holding that a videotape is prejudicial, and therefore inadmissible, even if it is illustrative of a witness' testimony, if it amounts to the *ex parte* testimony of an incompetent witness.<sup>52</sup>

It was not clear from the court's opinion exactly what aspect of the videotape consisted of "communicative content." Although the court may have believed that the videotape of the interrogation was communicative because of the "statements" made by persons in the tape,<sup>53</sup> it is submitted that the court could have found that videotape or film, even without a soundtrack, could be considered communicative if the subject of the film conveyed by his motions or lack of motion that which his oral statements would convey.<sup>54</sup> Such a conclusion may be criticized upon the ground that

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49. 496 F.2d at 791. Although these statements by the court appear somewhat contradictory (in that the extent of his disability would be directly related to his sanity), in reality they are not. Since the plaintiff had already been adjudicated incompetent, the issue was to what extent his condition disabled him in relation to his capabilities, and to what extent it necessitated treatment, regardless of his mental state.

50. *Id.* at 791-92. This blatant inconsistency was never resolved by the trial court, which only stated: "I am trying to figure out for what purpose it is being introduced if this doctor had never had a chance to observe him in that condition." *Id.* at 791.

51. *Id.* at 792.

52. *Id.*

53. Conceptually, this would certainly fit Professor McCormick's definition of hearsay as opposed to the argument that it be considered the testimony of the witness. See note 30 *supra*.

54. See MCCORMICK, *supra* note 16, at § 250. The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Statement is defined as "an oral or written assertion or 2) nonverbal conduct of a person, intended by him as an assertion." Act of January 2, 1975, Pub. L. No. 93-595, Rule 801(c)(2), 88 Stat. 4939.

a tape or film is no more communicative than a still photograph, which is generally considered not hearsay, but the testimony of the witness through a different medium.<sup>55</sup> Arguably, the difference in degree between a videotape and a photograph is as great as that between a photograph and a diagram so the same rules should apply to videotapes just as the same rules concerning diagrams were held to apply to photographs. A diagram is merely an approximate reproduction of the witness' testimony, an abstraction of it, while a photograph is the actual reproduction of it. However, the transition from being the testimony of the witness to being the testimony of the subject of the "photograph" may occur when motion, or motion and sound are added. In a case such as the present one, the videotape is no longer corroborating the testimony of the witness, but it is allowing the subject of the videotape to directly communicate verbally and visually to the jury. The subject, then, is testifying for himself via the film, which testimony is an out of court statement by the subject of the film offered to prove the truth of the matter asserted, and therefore hearsay.

In comparing *Foster* to *Thurman*, one basic similarity can be observed. In both cases, the audio portion was not part of the witness' testimony when the tape was introduced.<sup>56</sup> The hearsay problem was much more apparent in *Thurman*, however, since the audio portion was not an integral part of what had transpired during the taping since it was a narration of what had happened.<sup>57</sup> The most important dissimilarity between the cases is that the *Thurman* court admitted the visual portion of the videotape,<sup>58</sup> while in *Foster* the entire tape was held inadmissible. This may have been due to an "all or nothing" attitude by the *Foster* court, or more importantly, attributable to its belief that the videotape would have amounted to hearsay even without the soundtrack.<sup>59</sup>

With respect to *Richardson*, where the court admitted into evidence a motion picture over a hearsay objection,<sup>60</sup> *Foster* is distinguishable upon the basis of the purposes for which the film and videotape were introduced and the relation of the subject to the film or videotape. The film in *Richardson*, which tended to prove that the accident could only be attributable to the operator, was offered to show the maintenance of the machine and not the condition of the subject as in *Foster*.<sup>61</sup> Also the operator of the machine was in no way communicating to the jury in a testimonial sense as was the case in *Foster*.

55. See notes 22-23 and accompanying text *supra*.

56. In *Foster*, the audio consisted of the attorney's questions and the plaintiff's responses, rather than the witness' (the physician) testimony. 496 F.2d at 790. In *Thurman*, the audio portion consisted of a narration by an officer, which implies that it was not made by the same officer who was the witness.

57. See notes 37-38 and accompanying text *supra*.

58. 84 N.M. 8, 498 P.2d at 697.

59. See text accompanying note 54 *supra*.

60. See notes 31-34 and accompanying text *supra*.

61. 205 S.W.2d at 822-23.

As the *Foster* court properly characterized the videotape as hearsay, it was also on sound legal ground in rejecting the plaintiff's assertions that the tape was admissible under exceptions to the hearsay rule. Since the plaintiff's insanity was not in issue,<sup>62</sup> the court declined to consider whether "an ex parte staged demonstration, rather than testimony respecting observations of the everyday conduct of the allegedly insane person, qualifies as evidence of irrational conduct."<sup>63</sup> The court's reluctance to go further than necessary was prompted not only by judicial discretion, but also by its suggestion that the videotape was staged.<sup>64</sup> Although a majority of courts will admit staged, posed or artificially reconstructed photographs, films,<sup>65</sup> or videotapes<sup>66</sup> to illustrate the testimony of the witness, other courts reject them, emphasizing the possibility of the jury confusing the staged film with the actual occurrence.<sup>67</sup> Although a staged film should be admissible for illustrative purposes on the same theory as a diagram, in the case of a staged film dramatizing insane conduct, it would be self-contradictory in that the actor's ability to *pose* as insane would demonstrate that he is actually sane.

It should also be noted that the court, in discussing the exception to the hearsay rule for statements made to a physician to obtain treatment, only stated that films or videotapes of such may "*possibly*" be admissible.<sup>68</sup> Although the court gave no explanation for its caveat, its caution is perhaps due to the fact that the rationale for admitting such statements as exceptions to the hearsay rule may be negated by the videotaping or filming. The mere fact that the patient taped or filmed the occurrence in preparation for possible future litigation militates against the conclusion that the sole purpose of the patient's statements was to obtain accurate diagnosis and treatment.<sup>69</sup> The danger of colored statements and insincerity is greatly enhanced, and therefore, the rationale for admitting such statements becomes inapplicable.

The standard which the Third Circuit has formulated, then, is that the film must first meet the traditional standards or criteria for admissibility by being authenticated, relevant, and not prejudicial in the sense of being gruesome. In addition, the videotape must not amount to hearsay by being

62. See text accompanying note 49 *supra*.

63. 496 F.2d at 791 (emphasis added).

64. If the film was not staged, then there would be no objection to allowing it to corroborate the witness' testimony if he had testified.

65. See, e.g., 50 Nev. 271, 257 P. 619 (1927) (photograph of reconstructed crime); *Richardson v. Missouri-K-T-Ry.*, 205 S.W.2d 819 (Tex. Civ. App. 1947) (film depicting experiment supporting party's version of the actual event); *Annot.*, 19 A.L.R.2d 877 (1951).

66. *Zollman v. Symington Wayne Corp.*, 438 F.2d 28 (7th Cir.), *cert. denied*, 404 U.S. 827 (1971).

67. See, e.g., *Hutchinson v. Knowles*, 108 Vt. 195, 184 A. 705 (1936). See also *Annot.*, 19 A.L.R.2d 877 (1951).

68. 496 F.2d at 791.

69. A few jurisdictions will admit statements made to a physician in obtaining treatment even though he is also employed to testify. See, e.g., *McGORMICK*, *supra* note 14 at § 293.

communicative rather than pictorial, and must not amount to the ex parte testimony of an absent incompetent witness. Since Foster was an incompetent witness, there would be no manner in which a videotape with a soundtrack could be introduced since the court would hold that it amounted to the testimony of an incompetent witness. If, however, Foster had not been adjudicated incompetent, a videotape of his communications to his physician while he was obtaining treatment might have been held admissible, if properly authenticated.<sup>70</sup>

The court, in its brief but well reasoned opinion, recognized that the traditional standards for admitting photographs would not always suffice in dealing with videotapes, and provided a flexible standard for determining whether a videotape is inadmissible hearsay. Although the term "communicative" is broad, and perhaps even vague, such a general term was necessary, given the lack of case law on the subject of videotapes. Also, by allowing the specifics to be determined in subsequent cases, the court adhered to the long established precedent of leaving the admissibility of photographic materials within the discretion of the trial judge.<sup>71</sup>

*Mark Armbrust*

FEDERAL JURISDICTION — FEDERAL TORT CLAIMS ACT SECTION 2680(a) DISCRETIONARY FUNCTION EXCEPTION — THE PROFESSIONAL EVALUATION OF A SCIENTIST IS NOT A DISCRETIONARY ACTION AND THEREFORE AN ERROR COMMITTED PURSUANT TO SUCH AN EVALUATION MAY BE THE BASIS FOR A SUIT UNDER THE ACT.

*Griffin v. United States* (1974)

Less than 1 month after receiving the second of three doses of vaccine in a locally sponsored polio immunization program,<sup>1</sup> plaintiff Griffin had begun to feel sick. She subsequently required hospitalization and became a permanent quadriplegic, allegedly as a result of ingesting Type III polio vaccine.<sup>2</sup> The vaccine which the plaintiff had received had been tested for safety and potency by the Division of Biological Standards (DBS) of the United States Department of Health, Education, and Welfare, yet she

70. See 496 F.2d at 791.

71. See note 21 and accompanying text *supra*.

1. *Griffin v. United States*, 500 F.2d 1059, 1062 (3d Cir., 1974). The program which had been sponsored by the Montgomery County (Pa.) Medical Society, called for the doses of Sabin oral polio vaccine to be administered upon three different dates. Plaintiff never received the final dose. *Id.*

claimed that DBS had released it to the public in violation of agency regulations<sup>3</sup> in that the DBS approved vaccine that did not meet the prescribed standards. In bringing the instant action against the United States under the Federal Tort Claims Act<sup>4</sup> (FTCA), plaintiffs had contended, and the district court had found, that Mrs. Griffin was a member of the class of persons which the regulation was designed to protect; that she had suffered the harm which the regulation was designed to prevent; and that therefore, the approval of the vaccine by DBS had been negligent *per se*.<sup>5</sup> The trial court had further held that the negligence of the United States had been the proximate cause of the plaintiff-victim's injuries.<sup>6</sup>

The Government had contended that the suit was prohibited by the so-called discretionary function exception in section 2680(a) of the FTCA,<sup>7</sup> because DBS' decision to release the vaccine had involved the exercise of judgment.<sup>8</sup> The district court, however, had concluded that the Government's construction of that exception was too broad, and held that the action was not barred by section 2680(a) because DBS' conduct in releasing the vaccine deviated from the regulation and that any such deviation "which imposes a higher risk on the public, no matter how slight, is not a matter of discretion."<sup>9</sup> The district court had awarded damages to the

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3. The court of appeals affirmed the district court's holding that the release of the vaccine violated 42 C.F.R. § 73.114(b)(1)(iii) (1973), which provided for a comparative evaluation of the neurovirulence (virulence or effect upon the central nervous system which could be related to a pathologic entity such as polio) of the vaccine being tested as against the neurovirulence of a reference strain of vaccine. 500 F.2d at 1064 & n.10, 1065. This evaluation was accomplished by sacrificing and dissecting members of a vaccinated group of monkeys, and performing thereupon five comparative tests outlined in the regulation. By the terms of the regulation:

The virus pool under test is satisfactory for poliovirus vaccine manufacture only if at least eighty percent of the animals in each group survive the observation period and if a comparative analysis of the test results demonstrate that the neurovirulence of the test virus pool does not exceed that of the NIH Reference Attenuated Poliovirus.

42 C.F.R. § 73.114(b)(1)(iii) (1973). The appeals court said that the release of the vaccine violated the regulation because the specified comparative analysis had not shown that the neurovirulence of the test lot did not exceed the neurovirulence of the reference strain. 500 F.2d at 1062-63.

4. 28 U.S.C. §§ 1346(b), 2671-80 (1970). For the text of the statute, *see* note 19 *infra*.

5. Griffin v. United States, 351 F. Supp. 10, 34 (E.D. Pa. 1972).

6. *Id.* The court concluded that the negligence of the United States had been the proximate cause of the plaintiff's injuries for the following reasons:

[B]ut for the negligence the harm would not have occurred, . . . the negligence set in motion forces which led to the injury which D.B.S. might or ought to have anticipated, even though in advance the injury seemed improbable and the precise form in which the injury resulted could not have been foreseen, . . . the negligence created a significantly larger risk to the protected class of ultimate consumers which should have been foreseen and which came to fruition in the case of Mary Jane Griffin, and . . . the harm was the very injury intended to be prevented by the regulation, and must therefore be taken as proximately caused by its violation . . . .

*Id.*

7. 28 U.S.C. § 2680(a) (1970). For the text of the statute, *see* note 22 *infra*.

8. 351 F. Supp. at 33.

plaintiff-victim for her past and future medical expenses, lost future earning capacity, and her pain and suffering, and to her husband for loss of past and future consortium.<sup>10</sup> The trial court had rejected the Government's contention that the plaintiffs' recovery should be reduced by half due to the terms of a joint tortfeasor release which the plaintiffs had signed pursuant to the settlement of a separate suit against the drug manufacturer.<sup>11</sup>

On appeal, the Third Circuit affirmed in part and reversed in part, *holding* that the district court had correctly determined the issues of the Government's liability and the computation of damages; that the action had not been barred by the discretionary function exception to the FTCA because the decision to release the vaccine was not the protected, discretionary determination of a policymaker but the professional evaluation of a scientist;<sup>12</sup> and, alternatively, that section 2680(a) did not afford protection for the violation of a mandatory regulation.<sup>13</sup> The court further held that the joint tortfeasor release should be given effect,<sup>14</sup> and remanded the case for proceedings consistent with its opinion. *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974).

The doctrine of sovereign immunity was adopted and rigorously applied by American courts as a part of their legal inheritance from England, where the Crown had been immune from any suit to which it had not consented.<sup>15</sup> As the Federal Government expanded, however, the number of wrongs committed by its agents also increased; and the only remedy available to citizens for redress of these wrongs, that of the private bill

10. *Id.* at 34-38.

11. *Griffin v. United States*, 353 F. Supp. 324, 329 (E.D. Pa. 1973). The plaintiffs had commenced four separate actions: the instant action against the United States under the FTCA; an action in federal court against Charles Pfizer & Co., the drug manufacturer, which was settled out of court; and two actions in the state courts against the Montgomery County Medical Society which were voluntarily dismissed after the settlement with Pfizer. 500 F.2d at 1062 & n.5.

12. 500 F.2d at 1066.

13. *Id.* at 1069. For the discussion of this alternative holding, see text accompanying notes 37-43 *infra*.

14. THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, PA. STAT. ANN. tit. 12, §§ 2082-89 (1967), provides in pertinent part:

A release by the injured person of one joint tortfeasor . . . reduces the claim against the other tortfeasors in the . . . proportion by which the release provides that the total claim shall be reduced . . . .

*Id.* § 2085. The district court held the release to be legally ineffective for purposes of reducing the judgment because the controlling Pennsylvania case of *Davis v. Miller*, 385 Pa. 348, 123 A.2d 422 (1956), stood for the rule that, in order to give effect to a "pro rata share" clause in a plaintiff's release, a court must first determine the joint tortfeasor status of the settling party. Since the United States had not joined Charles Pfizer & Co., the vaccine's manufacturer, as a third party defendant, there was no determination of its joint tortfeasor status. 353 F. Supp. at 327-29. The Third Circuit, however, because the district court had ignored language in the release by which plaintiffs had waived the benefits of the *Davis* holding, held that the United States was entitled to the benefit of the release. 500 F.2d at 1073.

*See also* *Griffin v. United States*, 500 F.2d 1059, 88-2 USTC ¶13,000, 28 AFTR2d 74-6011 (CA-3, 1974), *aff'd*, 500 F.2d 1059 (CA-3, 1974), *cert. denied*, 421 U.S. 971, 48-2 USTC ¶9600, 18 AFTR2d 74-6011 (S. Ct., 1974).  
 15. *Function Exception of the Federal Tort Claims Act*, 57 Geo. L.J. 81 (1968).

in Congress, became increasingly burdensome and inequitable.<sup>16</sup> The demand arose, therefore, that federal tort claims be submitted to adjudication.<sup>17</sup>

Finally, in 1946, after nearly 30 years of consideration,<sup>18</sup> Congress passed the FTCA, a general waiver of immunity which rendered the federal government liable to the same extent a private person would be in a particular case.<sup>19</sup> Congress was particularly worried, however, about the potential liability of the Government for acts of a governmental nature or function.<sup>20</sup> Consequently, the Act included several exceptions to the waiver of immunity.<sup>21</sup>

One of these exceptions was the discretionary function exception.<sup>22</sup> In the landmark case of *Dalehite v. United States*,<sup>23</sup> the Supreme Court of the United States dealt with this exception and relied upon the "substantial historical ancestry"<sup>24</sup> of the concept of discretion in defining it as

16. *Id.*

17. *Id.* For a partial legislative history of the FTCA and the discretionary function exception thereto, see *Dalehite v. United States*, 346 U.S. 15, 24-30 (1953); *Feres v. United States*, 340 U.S. 135, 139, 140 (1950).

18. See *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

19. The FTCA provides in pertinent part:

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1970). See note 4 and accompanying text *supra*.

20. See H.R. REP. NO. 1287, 79th Cong., 1st Sess. 5 (1945); H.R. REP. NO. 2800, 71st Cong., 3d Sess. 13 (1931). See also *Dalehite v. United States*, 346 U.S. 15, 28 & n.18 (1953).

21. 28 U.S.C. §§ 2680(a)-(n) (1970).

22. The discretionary function exception is embodied in section 2680(a) of the FTCA, which provides in pertinent part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1970).

23. 346 U.S. 15 (1953).

24. *Id.* at 34. The Court found this history in its own cases. For example, in *Spalding v. Vilas*, 161 U.S. 483 (1895), it had written:

In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

*Id.* at 498.

Further, the Court had stated in *Louisiana v. McAdoo*, 234 U.S. 627 (1913), that

if the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for



being the freedom of the executive or the administrator to act according to his judgment of the best course.<sup>25</sup> The Court stated that discretion includes not only the initiation of programs and activities but also the determinations made in establishing plans, specifications, or schedules of operations.<sup>26</sup> The Court concluded that "where there is room for policy judgment and decision there is discretion."<sup>27</sup> Two years later, in *United States v. Union Trust Co.*,<sup>28</sup> the Supreme Court affirmed the District of Columbia Circuit's restatement of the *Dalehite* rationale and its inference from the *Dalehite* Court's definition of discretion that the United States was liable only when the negligence of its employees occurred at the operational level, where there was no room for policy judgment or decision.<sup>29</sup>

In its own cases, the Third Circuit had relied heavily upon *Dalehite* and, to a lesser extent, upon *Union Trust* in applying the planning-operational distinction to its consideration of the discretionary function exception.<sup>30</sup> However, *Griffin* presented a more difficult analytical problem than had previous cases because there was no clear factual basis for resolving the issue of the applicability of the discretionary function exception.

The crucial consideration in *Griffin* was the characterization of the process by which DBS approved the polio vaccine for release to the public.<sup>31</sup> The Government argued that the process involved a discretionary function because the determination that the neurovirulence of a particular lot of vaccine did not exceed that of the reference strain involved the exercise

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that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government.

*Id.* at 633. See also *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131 (1939); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

25. 346 U.S. at 34.

26. *Id.* at 35-36.

27. *Id.* at 36.

28. *United States v. Union Trust Co.*, 350 U.S. 907 (1955) (per curiam). In this case, Eastern Air Lines had sued the Government for damages allegedly caused by the negligence of federal control tower employees in regulating air traffic. The circuit court had found the controllers' actions to be clearly at an operation level devoid of policymaking authority and therefore not within the section 2680(a) exception. *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62, 78 (D.C. Cir. 1955).

29. *Eastern Air Lines v. Union Trust Company*, 221 F.2d 62, 76-77 (D.C. Cir.), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955) (per curiam).

30. In *Mahler v. United States*, 306 F.2d 713 (3d Cir. 1962), plaintiffs had been injured when the automobile in which they were riding struck a boulder that had fallen upon a highway constructed under a federal grant. *Id.* at 714-15. The court affirmed a district court judgment for the Government concluding that the decision made by the Secretary of Commerce to approve the highway plans obviously had been a policy judgment falling upon the "planning side of the planning-operational distinction drawn in the *Dalehite* case, subsequently adopted and approved in *Eastern Airlines, Inc. v. Union Trust Co.*, . . ." *Id.* at 723.

In *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973), plaintiffs alleged personal injury and property damage stemming from sonic booms caused by military aircraft. *Id.* at 668. The court recognized that the discretionary function exception barred recovery for the possible negligence of the individuals at the planning level who had authorized the flights, but not for the possible negligence of those at the operational level who actually had executed the flights. *Id.* at 670.

31. See note 3 *supra*.

of judgment.<sup>32</sup> The Third Circuit, however, rejected the Government's contention as overly broad, stating that since almost all activity includes some judgmental component, the effect of the Government's interpretation would be to immunize all but the most purely ministerial acts.<sup>33</sup> The court said that even *Dalehite* limited the class of decisions which could be considered discretionary to those which "involved, at minimum, some consideration as to the feasibility or practicability of Government programs."<sup>34</sup> While the court acknowledged that DBS had made a judgmental determination of the degree to which each of the regulation's five tests indicated neurovirulence in monkeys,<sup>35</sup> it reasoned that the agency had not been acting as a policymaker balancing policy considerations, but as a professional making a scientific determination of neurovirulence. Hence, the agency's decision did not come within the discretionary function exception.<sup>36</sup>

The court established an alternative basis for its decision denying the applicability of section 2680(a).<sup>37</sup> In the court's view, even if one assumed *arguendo* that DBS' approval of vaccine lots for release had been a discretionary function, plaintiffs' action would not have been barred because DBS had relied upon a factor called "biological variation"<sup>38</sup> in disregarding the unsatisfactory test results obtained in determining the neurovirulence of the vaccine.<sup>39</sup> Since such reliance was not authorized by the regulation,<sup>40</sup> the court concluded that DBS' activity, even if classified as discretionary, was not immunized from judicial review because no discretion to disregard the regulation had been conferred.<sup>41</sup> In support of its conclusion, the court cited the Ninth Circuit's opinion in *United Air Lines v. Wiener*,<sup>42</sup> which

32. 500 F.2d at 1063.

33. *Id.* at 1063-64.

34. *Id.* at 1064, citing *Dalehite v. United States*, 346 U.S. 15, 41 (1953).

35. The regulation specified five different comparative tests by which the neurovirulence of the test lot of vaccine could be measured against the neurovirulence of the reference strain of vaccine. These tests involved examining the effects of the vaccines upon the brains and spinal columns of monkeys. For a general outline of the procedure, see note 3 *supra*.

36. 500 F.2d at 1066.

37. *Id.* at 1067-69.

38. The court discussed this factor as follows:

The concept of "biological variation" is premised on the fact that a group of similar subjects will respond differently to a single stimulus. The variation in response is due not to variations in the stimulus but rather to differences in the subjects.

*Id.* at 1067.

39. *Id.* In the neurovirulence testing, DBS had concluded that the unfavorable test results were not due to a defect in the vaccine, but rather to unusual characteristics in the monkeys inoculated with the test vaccine. *Id.* at 1068.

40. See *id.* at 1068-69.

41. *Id.*

42. 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964). This case arose out of the midair collision between a United Air Lines airliner and a United States Air Force jet fighter. Air Force regulations required Air Force Command to establish local flying areas in the least congested airspace available so that fighters executing the type of maneuver in which the ill-fated fighter had been involved could do so safely. *Id.* at 393-94. The Ninth Circuit had recognized that such a designation of permissible flying areas would have been an unreviewable discretionary determination. *Id.* at 394. The regulations, however, were never complied with and

had held that the violation of a mandatory, regulatory command took an otherwise discretionary function beyond the scope of the statutory exception.<sup>43</sup>

Judge Van Dusen submitted a vigorous dissent to the majority's holding that no discretion had been involved in approving the vaccine;<sup>44</sup> and in light of the established case law upon the subject of the discretionary function exception,<sup>45</sup> it would appear that his exception was well taken. Judge Van Dusen reasoned that DBS' procedures had involved the exercise of discretion in two respects:

First, in making the comparative analysis of the vaccine lot test results and the reference strain test results, DBS had to determine, as a preliminary matter, how much weight to accord to each of the five factors enumerated in the regulation, based on the degree to which it believed each factor reflected neurovirulence.<sup>46</sup>

Second, DBS had to make "the determination of exactly what the neurovirulence level of the reference strain was at any given time."<sup>47</sup> He concluded, therefore, that these determinations involved the exercise of policy and planning discretion as well as the exercise of professional judgment because the making of these determinations had constituted the selection of the method by which DBS undertook to determine whether or not the vaccine was safe for release to the public.<sup>48</sup>

The cases cited in *Dalehite* to establish the "substantial historical ancestry" of the concept of discretion<sup>49</sup> unanimously discussed both the problem of judicial review interfering with the discretionary action of a government official and the resulting disruption of the governing process. *Griffin* appears to have been the type of situation which the Court addressed in those cases.<sup>50</sup> As government activities reflect society's increas-

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approximately 85 percent of the maneuvers had taken place over and within an airspace designated for commercial air traffic. *Id.* at 393-94.

43. *Id.* at 393-94.

44. 500 F.2d at 1073-78 (Van Dusen, J., dissenting).

45. See notes 23-30 and accompanying text *supra*.

46. 500 F.2d at 1075 (citation omitted). In making this determination, DBS had had to decide which of these tests was the most significant in terms of reflecting the neurovirulence of the lot being tested, and, consequently, whether a negative result from one or two of the less significant tests was grounds for failing to release a test lot despite a positive result from the three or four more significant tests. *Id.*

47. *Id.* at 1076. This determination was quite complicated because the neurovirulence of the reference strain was constantly varying. Each retest of that strain produced a different result, and therefore DBS had to determine what weight to give the retest in setting the neurovirulence level of the reference strain. *Id.*

48. *Id.* In addition, Judge Van Dusen stated that he found it difficult to distinguish the activities of DBS from the activities which the Supreme Court had held to be discretionary in *Dalehite*. But see *id.* at 1066 n.16A.

49. See note 24 *supra*.

50. It is submitted that if DBS had made its decision with a view toward possible litigation, very little vaccine might have been released. DBS would be inclined, in order to protect itself, to estimate the neurovirulence of the reference strain at a low level and be extremely rigorous in demanding that the test lots met this standard in all respects. This approach, instead of emphasizing the greatest good for the public —

ing technological orientation, more government officials will become involved in policy decisions of a professional, scientific nature.<sup>51</sup> If each such decision, although mandated by statute and fully within the official's function, were made under the potential threat of civil suit, the resulting atmosphere of fear and pressure could require officials to spend more time anticipating and preparing for court battles than attempting to satisfactorily perform their designated duties.<sup>52</sup>

Despite this possible disruptive effect upon the functioning of its officials, the Government has chosen not to appeal *Griffin* and has paid the modified judgment. This decision can be attributed to several factors. First, since the majority had an alternative basis for its decision, a reversal of the court's holding that the DBS official's decision was not discretionary would not necessarily have meant reversal of the instant decision.<sup>53</sup> Second, *Griffin* was a difficult fact situation involving a relatively minor official.<sup>54</sup> Third, the Government may have anticipated that the Court would be swayed in the plaintiffs' favor due to the extreme hardship they had suffered. The combination of these factors might have led the Government to conclude that it would be advantageous to select a more appropriate case for appeal to the Supreme Court in order to successfully refute the Third Circuit's reasoning about the inapplicability of section 2680(a).

Of course, a court faced with a victim who had suffered as greatly as the plaintiff in the instant case might raise another issue: Does *equity* demand that some relief be granted to the victims of errors committed by government officials? Cases of extreme hardship, however, are probably uncommon; and the disruption of the governing process which could result from the removal of the protection which the discretionary function exception provides to officials in their planning capacity would be great. Therefore, some mechanism which retains the general protection of the exception yet remedies extreme wrongs worthy of redress should be devised. One such system is presently in existence: private bills in Congress. The plaintiffs in *Dalehite*, who suffered injury in a disaster, ulti-

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the release of sufficient vaccine to adequately control the disease with minimum risk — would emphasize the protection of DBS.

51. The *Griffin* majority opinion cited the Second Circuit's opinion in *Hendry v. United States* in support of the following proposition:

The fact that judgments of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from the examination of courts by classifying them as discretionary functions under the Act. 500 F.2d at 1066, quoting *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969). In *Hendry* a ship's officer alleged that a psychiatrist's determination that he was unfit for sea duty had been negligent, and the court conceded that "[t]he only discretion apparently contemplated is that inherent in the judgments of any medical doctor in private practice." *Id.* at 783. The discretion exercised by DBS involved more consideration of planning and the policy objective of the safe release of vaccine, and *Hendry*, therefore, appears clearly distinguishable.

52. Reynolds, *supra* note 15, at 121.

53. See text accompanying notes 37-43 *supra*.

54. The precedential value of the case, therefore, may be relatively limited.

mately obtained relief in this manner.<sup>55</sup> The process of presenting private bills before Congress has been burdensome and inequitable in the past,<sup>56</sup> however, and it could be expected that such a method would be largely governed by political considerations. Therefore, another alternative, such as an impartial committee to review the worthiness of claims, might redress the hardships of a situation like *Griffin* without limiting the protection of section 2680(a).

Until such time as the Third Circuit's logic, in deciding that scientific determinations such as the one in *Griffin*, were not discretionary, is tested in the Supreme Court, a decrease in the protection offered by the discretionary function exception can be expected; and government officials must be aware of their increased susceptibility to suit under the FTCA.

Robert Anthony

CRIMINAL PROCEDURE — GRAND JURY SUBPOENAS — IN A PROCEEDING TO ENFORCE A FEDERAL GRAND JURY SUBPOENA, THE GOVERNMENT MUST PROVIDE COURT AND WITNESS WITH AN AFFIDAVIT STATING THE RELEVANCE OF MATERIAL IT SEEKS.

*In re Schofield* (1973)

Appellant Jacqueline Schofield was held in civil contempt for failure to show cause why she should not obey an order issued by the United States District Court for the Eastern District of Pennsylvania directing her to comply with a grand jury subpoena.<sup>1</sup> Ms. Schofield was subpoenaed to testify before a federal investigative grand jury, but when she appeared at the office of the United States Attorney at the designated time, she was not asked to testify, but to provide handwriting exemplars and submit to fingerprinting and photographing.<sup>2</sup> She refused, arguing that a grand jury witness had no need to comply with such requests unless the Government stated the necessity and purpose for the requested information and permitted the witness to examine any documents in its possession which the witness allegedly had signed.<sup>3</sup>

55. Reynolds, *supra* note 15, at 96. The Texas City disaster of 1947 occurred when fires and explosions erupted after the federal government had loaded ships with fertilizer containing combustible ammonium nitrate. A House Committee investigated the merits of private relief bills shortly after the *Dalehite* decision, and relief was granted by Congress in 1955. *Id.*

56. See text accompanying notes 16 & 17 *supra*.

1. *In re Schofield*, 486 F.2d 85, 87 (3d Cir. 1973). A form subpoena was routinely issued by the office of the clerk of the court, and, pursuant to Federal Rule of Criminal Procedure 17(a), was delivered to the office of the United States Attorney who thereafter filled in the blanks. *Id.* at 87.

2. *Id.* at 88.

The Third Circuit reversed the district court's civil contempt judgment,<sup>4</sup> holding that before a witness can be found in contempt for refusing to obey a grand jury subpoena, the Government must make a showing by affidavit that each item sought by the subpoena is relevant to an investigation properly being conducted by the grand jury and is not sought primarily for another purpose. The court further held that absent extraordinary circumstances the Government must, in an enforcement proceeding, disclose the affidavit to the witness. *In re Schofield*, 486 F.2d 85 (3d Cir. 1973).

Despite its great antiquity as an institution,<sup>5</sup> the grand jury can still create judicial controversy.<sup>6</sup> The Supreme Court of the United States recently expressed its attitude towards the rights of grand jury witnesses in a case decided after *Schofield*, *United States v. Calandra*,<sup>7</sup> wherein the Court reversed the lower courts' rulings that a grand jury witness could invoke the fourth amendment's judicially-fashioned exclusionary rule,<sup>8</sup> holding that the rule was not applicable to grand juries because to extend

4. Contempt proceedings were brought against the appellant pursuant to Federal Rule of Criminal Procedure 17(g) and Section 301(a) of the Organized Crime Control Act of 1970, 28 U.S.C. § 1826(a) (1970). Rule 17(g) provides in pertinent part: CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued . . . .

FED. R. CRIM. P. 17(g). While rule 17(g) speaks of contempt in general terms, it does not specify whether a contemner is to be found in criminal or civil contempt. A court imposes criminal contempt sanctions to punish action which it considers an affront to its dignity. On the other hand, it imposes civil contempt sanctions to coerce a contemner to do that which he or she has refused to do. See *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911). Like rule 17(g), section 1826(a) permits the recalcitrant witness to avoid the sanction of contempt by showing just cause for refusing to comply with an order to testify or provide information to the grand jury. 28 U.S.C. § 1826(a) (1970).

5. *United States v. Cox*, 342 F.2d 167, 186 (5th Cir. 1965). See *In re Grand Jury January, 1969*, 315 F. Supp. 662, 671 (D. Md. 1970); *Campbell, Eliminate The Grand Jury*, 64 J. CRIM. L. & C. 174 (1973).

6. See generally *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Mara*, 410 U.S. 19 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Gelbard v. United States*, 408 U.S. 41 (1972); *Kastigar v. United States*, 406 U.S. 441 (1972); *Costello v. United States*, 350 U.S. 359 (1956).

7. 414 U.S. 338 (1974), noted in 19 VILL. L. REV. 645 (1974). Calandra's office was searched by federal agents with a search warrant for gambling paraphernalia. In the course of the search, an agent who was aware of a pending federal investigation of loansharking seized a record of loansharking activities. 414 U.S. at 340-41. Subpoenaed to appear before a grand jury, Calandra sought suppression and return of the evidence pursuant to rule 41(e) of the Federal Rules of Criminal Procedure upon the grounds that (1) the affidavit supporting the warrant was insufficient, and (2) the search had exceeded the scope of the warrant. *In re Calandra*, 332 F. Supp. 737 (N.D. Ohio 1971); *United States v. Calandra*, 465 F.2d 1218 (6th Cir. 1972).

8. The exclusionary rule requires that evidence seized as a result of illegal searches and seizures not be admissible against the defendant. The Supreme Court devised and applied this rule to federal courts in *Weeks v. United States*, 232 U.S. 383 (1914). The Court, thereafter, held that the due process clause of the fourteenth amendment required that the states exclude from trial evidence seized in violation of the fourth amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961).

it to such proceedings would delay and disrupt them without substantially furthering the rule's objectives.<sup>9</sup>

Delay of grand jury proceedings occasioned by fourth amendment claims was also the Court's focus in *United States v. Dionisio*,<sup>10</sup> where a federal grand jury witness refused, upon fourth amendment grounds, to provide voice exemplars.<sup>11</sup> The Supreme Court therein held that compelling the witness to furnish voice exemplars did not violate the amendment, and therefore the circuit court had incorrectly required a preliminary showing of reasonableness.<sup>12</sup> The Court stated that "neither the Constitution nor our prior cases justify any such interference with grand jury proceedings."<sup>13</sup> While the *Dionisio* Court acknowledged that the grand jury does not always fulfill its traditional role of buffer between the prosecutor and the citizen,<sup>14</sup> it reiterated its respect for the grand jury's traditional freedom to pursue its investigations "unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it."<sup>15</sup>

Thus, in *Calandra* and *Dionisio* the Supreme Court seemed to express hostility towards the granting of additional procedural rights to grand jury witnesses. Specifically, it refused to allow grand jury witnesses to invoke the

9. 414 U.S. at 350-52. The rule's purpose is that of deterring unlawful police conduct, not that of providing a remedy to the victim. Hence, the Court said that the rule only applied when the deterrent purpose would best be served. *Id.* at 348. In the judgment of the Court, the rule was best applied in proceedings where a criminal sanction could result from the unlawfully obtained evidence. *Id.* at 348.

10. 410 U.S. 1 (1973).

11. *In re Dionisio*, 442 F.2d 276 (7th Cir. 1971). The witness appealed from the district court's finding of contempt in an unreported decision, and won a reversal from the Seventh Circuit upon the ground that the fourth amendment required the Government to make a preliminary showing of reasonableness. *Id.* at 280-81.

12. 410 U.S. at 9. This holding was based upon two grounds: First, the subpoena was not a seizure within the meaning of the fourth amendment. Second, since the voice is constantly exposed to public scrutiny, ordering an exemplar was not a violation of a witness' reasonable expectation of privacy. *Id.* at 14. A companion case, *United States v. Mara*, 410 U.S. 19 (1973), reached a similar result as to handwriting exemplars.

13. 410 U.S. at 14. The Court did note that the fourth amendment does provide protection against an unreasonable subpoena duces tecum. *Id.* at 11.

14. *Id.* at 17-18. The traditional role of the grand jury was to stand between the prosecutor and the individual as an independent investigatory body with broad powers to bring evidence before itself in order to decide whether or not the prosecutor's charges were well founded. Campbell, *supra* note 3, at 176. Many commentators argue that in a modern urban society, where the grand jurors have no personal knowledge of the persons and acts under investigation, the grand jury is functionally reduced to a tool in the hands of the prosecutor. See, e.g., *id.* at 177-78. Campbell noted:

The impact of the prosecutor's position in this scheme of things cannot be overestimated. Its pervasiveness is high-lighted by the simple fact the grand jury proceedings are non-adversarial in nature. There is no requirement that both sides be heard. Witnesses appearing before a grand jury are not entitled to the presence of counsel. Questions propounded a witness are not subject to the ordinary rules of evidence. The scope of the grand jury's inquiry, although unlimited in theory, is subject to the skillful control and direction of the prosecutor.

*Id.* at 177.

15. 410 U.S. at 17-18. The Court wrote that it disfavored any holding that would "subject a grand jury with imminents and preliminary showings." *Id.* at 17.

fourth amendment procedural safeguards available to defendants at trial,<sup>16</sup> while strongly supporting the traditionally broad scope of the grand jury's powers, and demonstrating a disinclination to restrict or impede its work.

The first issue facing the *Schofield* court was the Government's argument that *Dionisio* controlled the case at bar and precluded the court from making any inquiry beyond the facts appearing upon the face of the grand jury subpoena.<sup>17</sup> The instant court characterized this contention as giving "much too broad a compass to the holding in *Dionisio*."<sup>18</sup> That case, the court reasoned, concerned the substantive question of whether the fourth amendment required a showing of reasonableness in order to permit the enforcement of a grand jury subpoena, while the instant case raised only the question of what procedures a court should require as part of its supervisory powers over subpoenas in an enforcement proceeding.<sup>19</sup>

In describing the judiciary's supervisory powers over grand jury proceedings,<sup>20</sup> the court articulated three fundamental propositions. First, federal grand juries are essentially law enforcement agencies; that is, elements of the investigative arm of the executive branch.<sup>21</sup> Second, since the court clerk issues the subpoenas in blank to anyone requesting them, the court exercises no control over their initial use.<sup>22</sup> Third, it is a fiction to discuss grand jury subpoenas as if they were instruments of the grand jury because they are, in fact, almost universally tools of the prosecutor's office.<sup>23</sup> The grand jury, the court noted, is functionally a part of the executive branch, and grand jury subpoenas are "exactly analogous" to subpoenas issued by federal administrative agencies.<sup>24</sup> Therefore, Judge Gibbons reasoned, since a court acts judicially and functions as more than a rubber stamp when it enforces administrative subpoenas, it must make

16. 414 U.S. at 348-55; 410 U.S. at 9-15. For discussions of the fifth amendment rights of grand jury witnesses, see Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470 (1974); Comment, *The Grand Jury Witness' Privilege Against Self-Incrimination*, 62 NW. U.L. REV. 207 (1967).

17. 486 F.2d at 88-89.

18. *Id.* at 89.

19. *Id.* at 92. The *Schofield* Court noted:

Both [*Mara* and *Dionisio*] hold that the fourth amendment does not require any preliminary showing for the issuance of a grand jury subpoena, either to compel testimony, or to compel production of voice or handwriting exemplars. Neither, however, involves any question as to the propriety of the grand jury's investigation, the legitimacy of the purpose for issuing the subpoena, or any non-constitutional objection to its enforcement. . . . The issues raised by this appeal were not presented to or passed upon by the Supreme Court in *Dionisio* . . .

*Id.* at 89.

20. A noncomplying witness can avoid a citation for contempt by demonstrating that he has "good cause" for his noncompliance. See note 4 *supra*. The court's determination of whether "good cause" exists is an exercise of its supervisory power over the grand jury. 486 F.2d at 90-92.

sending); Campbell, *supra* note 5. See also note 14 *supra*.

21. 486 F.2d at 89-90.

22. *Id.* at 90.

23. *Id.* See *United States v. Dionisio*, 410 U.S. 1, 23 (1973) (Douglas, J., dissenting); Campbell, *supra* note 5. See also note 14 *supra*.



a similarly full and complete judicial determination of whether an alleged contemner has shown just cause for his or her noncompliance with the grand jury subpoena.<sup>25</sup>

In determining the scope of a hearing upon the question of just cause, the Third Circuit rejected the Government's contention that a district court has only a limited role in enforcing a subpoena.<sup>26</sup> In reaching its conclusion that a district court inquiry is appropriate, the court said that since the Supreme Court held in *Gelbard v. United States*<sup>27</sup> that section 310(a) of the Organized Crime Control Act of 1971<sup>28</sup> allowed a noncomplying witness to attack contempt charges by presenting all defenses properly available to him,<sup>29</sup> clearly something more than a summary proceeding was required.<sup>30</sup>

Turning its attention to the necessary procedures,<sup>31</sup> the court recognized that since a presumption of regularity attaches to a subpoena, the burden of showing some irregularity is upon the witness.<sup>32</sup> However, the relevant information is usually in the hands of the governmental enforcement agency, and is unavailable to the witness because of Federal Rule of Criminal Procedure 6(e), which provides for secrecy of matters occurring before the grand jury.<sup>33</sup> The court concluded that since secrecy

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25. *Id.* at 90-91. It is submitted that insofar as the court sought to advance the proposition that the grand jury is subject to judicial control and review, the analogy between administrative and grand jury subpoenas may have been superfluous. The court could have reached the same conclusion by emphasizing a point that it mentioned only in passing: the subpoenas are issued by the court clerk in blank, and filled in and served by the prosecutor at the direction of the grand jury. *Id.* at 90. Since an enforcement proceeding is the only opportunity for the court to make an independent determination of the subpoena's merits, it seems to be beyond question that the court has both the right and the obligation through judicial review to control grand juries and prevent abuse of the subpoena.

The drawing of an analogy between administrative and grand jury subpoenas is valid because the Supreme Court has indicated that both types of subpoenas serve the same function, that both are subject to the same limitations, and that the federal courts act properly when they require proof of the relevance to an investigation of the information sought by each. See *Oklahoma Press Publ. Co. v. Walling*, 327 U.S. 186, 217 n.57 (1945).

26. 486 F.2d at 92.

27. 408 U.S. 41 (1972). Although *Gelbard*, like *Schofield* and *Dionisio*, involved a prosecution under section 1826(a) of a noncomplying federal grand jury witness, the case has little relevance to *Schofield* or *Dionisio*. *Gelbard*'s defense was based upon 18 U.S.C. § 2515 (1968) which provides, *inter alia*, that evidence obtained by federal agents from an illegal wiretap is inadmissible in federal grand jury proceedings. The *Gelbard* Court characterized the issue as "[t]he narrow question . . . whether under these circumstances the witnesses may invoke the prohibition of § 2515 as a defense to contempt charges . . . . We think they may." 408 U.S. at 47.

28. 28 U.S.C. § 1826(a) (1970).

29. 408 U.S. at 41.

30. 486 F.2d at 92-93.

31. *Id.* at 92.

32. *Id.* See note 4 *supra*.

33. FED. R. CRIM. P. 6(e). See 486 F.2d at 93. See generally Comment, *Secrecy in Grand Jury Proceedings: A Proposal For a New Federal Rule of Criminal Procedure 6(e)*, 38 FORDHAM L. REV. 307 (1969); Comment, *Federal Grand Jury Secrecy*, 50 CALIF. L. REV. 255 (1962).

precluded any effective discovery by the witness, the party seeking enforcement should be required to make a minimum showing of the existence of a proper purpose as a prerequisite for judicial enforcement of the subpoena.<sup>34</sup> This showing, the court stated, must indicate that the information subpoenaed is "at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction; and . . . not primarily sought for another purpose."<sup>35</sup>

The court noted that although an in camera presentation of an affidavit might be required in extraordinary circumstances, in most cases, the Government's affidavit should be disclosed to the witness.<sup>36</sup> The court added that the determination of whether the witness could obtain discovery beyond the Government's affidavit requires a court to balance "the quite limited scope of an inquiry into abuse of the subpoena process, and the potential for delay, against any need for additional information which might cast doubt upon the accuracy of the Government's representations."<sup>37</sup>

The *Schofield* dicta granting possible additional discovery to a witness may operate to undermine the Supreme Court's policy against — as it termed them in *Dionisio* — "minitrials."<sup>38</sup> As applied to *Schofield*, the minimum showing required before enforcement proceedings can be initiated would involve only the court and the Government; although the witness would obviously be an interested party, he or she would have no active role after having made the initial refusal that necessitates the enforcement proceedings. However, it is submitted that once the Government has made a sufficient showing of regularity and its affidavit has been given to the witness, any further proceeding concerning the regularity of the subpoena will inevitably be adversary in nature, because in a motion for additional discovery the witness would make specific objections to the Government's affidavit in an attempt to overcome the Government's prima facie showing of the subpoena's regularity. Such a proceeding involving directly conflicting interests would generate exactly the sort of adversary "minitrial" which *Dionisio* and Chief Judge Seitz, in his concurring opinion,<sup>39</sup> condemned.

This potential problem leads to the broader question of whether *Schofield* is consistent with *Dionisio*. In light of *Dionisio*'s narrow holding, it seems clear that the instant court soundly stated that "[t]he issues raised in this appeal were not presented to or passed upon by the Supreme Court in *Dionisio*."<sup>40</sup> However, because the *Schofield* court never addressed the

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34. 486 F.2d at 92-93.

35. *Id.* at 93.

36. *Id.*

37. *Id.*

38. 410 U.S. at 17. See notes 8-15 and accompanying text *supra*.

39. 486 F.2d at 94 (Seitz, C.J., concurring).

*Dionisio* dicta condemning preliminary showings and minitrials, it failed to clarify the scope of its minimal showing requirement.

First, as Chief Judge Seitz pointed out in his concurring opinion, the majority did not make it clear whether the minimal showing of proper purpose can be factually litigated by the witness.<sup>41</sup> If *Schofield* stands for such a proposition, he wrote, it is clearly inconsistent with *Dionisio*'s admonition against minitrials.<sup>42</sup> Furthermore, if *Schofield* is read to require only a minimal showing by the Government, it still may be argued that even this requirement conflicts with the *Dionisio* dicta condemning preliminary showings.<sup>43</sup> Certainly *Schofield* requires that the Government make a showing of certain facts prior to the enforcement of a subpoena, and it is submitted that this is, at least technically, a preliminary showing such as that condemned by the *Dionisio* Court.

There are at least three possible explanations for the Third Circuit's failure to address this apparent conflict with *Dionisio*. First, the *Schofield* court may have declined to discuss that portion of *Dionisio* because it was clearly dicta. However, the Third Circuit did not mention this as a reason; and the Supreme Court's language is so obviously relevant to *Schofield* that it probably merited discussion even if not strictly a part of the holding. Second, the *Schofield* court may have viewed the *Dionisio* language as a part of the Supreme Court's holding; i.e., the Court was condemning, not all preliminary showings, but only preliminary showings of reasonableness.<sup>44</sup> Under this analysis, the dicta would appear to only restate the holding. Such an interpretation is questionable, however, given the Court's failure to limit its condemnation to preliminary showings of reasonableness and its express statement that it disfavored preliminary showings and minitrials because they would "assuredly impede [the grand jury's] investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."<sup>45</sup>

A third reason for the court's apparent circumvention of the *Dionisio* dicta may be an arguable distinction between preliminary showings that would cause delay and those that would not. Though *Schofield* involved a preliminary showing, its requirements should not result in any measurable delay. A prosecutor who wants a subpoena enforced must go to court in any event;<sup>46</sup> *Schofield* only requires that the prosecutor file an affidavit of minimal showing along with his motion for enforcement. There is no additional proceeding and thus no unnecessary delay. If the *Dionisio*

41. *Id.* at 94 (Seitz, C.J., concurring).

42. *Id.* (Seitz, C.J., concurring).

43. *Id.*

44. See notes 10-16 and accompanying text *supra*.

45. 410 U.S. at 17.

46. *Id.* at 23 n.5 (Seitz, C.J., concurring).

Court's dissatisfaction with preliminary showings was based upon their potential for delay — an interpretation suggested by the Court's discussion of the "expeditious administration of the criminal laws" — then the affidavit procedure outlined in *Schofield* seems defensible.<sup>47</sup>

The *Schofield* court made no express attempt to reconcile the policy articulated in *Dionisio* against preliminary showings and minitrials with the permissible scope of the court's supervisory powers over the grand jury. The court's failure to discuss this apparent policy conflict is evidence that it may have thought that the issue was insolvable, or, at least, that there was no way of harmonizing the *Dionisio* policy with the facts before it.<sup>48</sup>

It is submitted that the *Schofield* holding will affect Third Circuit contempt cases only when the abuse of the subpoena power is flagrant. The power of the grand jury is broad and the minimal showing requirement of the instant case is indeed minimal. The prosecutor need show only that the information is relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and that the information requested is for a proper purpose.<sup>49</sup> The prosecutor need not show the necessity for the subpoena, or even its reasonableness;<sup>50</sup> and with such broad parameters, a skillful prosecutor can probably obtain, in a large majority of cases, any desired information or evidence without committing any irregularities.

However, the *Schofield* procedure does protect a grand jury witness against an obviously improper subpoena before it is enforced. Prior to *Schofield*, Third Circuit grand jury witnesses who refused to comply with a subpoena for what they believed to be a legally sufficient reason had no assurance that the district court would consider the issue of whether the subpoena was improper.<sup>51</sup> Thus, they had the choice of either obeying what they felt was an illegal subpoena, or refusing to comply and raising

47. It is submitted that since the relevance of questions asked a witness is usually self-evident, the *Schofield* minimal showing procedure should perhaps be limited to similar factual situations. A witness requested to submit nontestimonial evidence such as handwriting, fingerprints, or photographs, has no way of determining that the request is a proper part of an investigation within the power of the grand jury, and since the information is nontestimonial, he has no basis for a claim of self-incrimination. 410 U.S. at 22. The minimal showing requirement protects the witness in such a situation. However, when testimonial evidence is involved, the witness has an opportunity to claim self-incrimination, and generally it is readily determinable whether or not the information is relevant to a proper purpose.

48. See, e.g., 414 U.S. at 349-50; 410 U.S. at 17 n.16, where the Supreme Court discussed the problem of delay resulting from preliminary showings.

49. 486 F.2d at 93.

50. 410 U.S. at 17 n.16.

51. The instant case provides an example of this lack of judicial scrutiny. The district court issued an order directing compliance with the grand jury subpoena based only upon the Government's representations that the witness had been subpoenaed, had refused to comply, and had no fourth or fifth amendment grounds for refusal. 486 F.2d at 87.

the issue of its invalidity in an appeal from a contempt conviction. Now, a Third Circuit grand jury witness can be certain that the district court will pass upon the issue of the subpoena's legality at the outset of enforcement proceedings.

Neil Albert

FEDERAL PROCEDURE — ATTORNEYS' FEES — ATTORNEYS PETITIONING FOR FEES FROM A CLASS ACTION SETTLEMENT FUND ARE LIMITED TO THE FAIR VALUE OF THEIR SERVICES, AS DETERMINED AT AN EVIDENTIARY HEARING.

*Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.* (1973)

In a complex antitrust class action,<sup>1</sup> a settlement was concluded whereby a \$26 million fund was established for the class. Following the settlement, attorneys for the represented plaintiffs petitioned the court for fees, in addition to those received pursuant to private agreements, to be awarded from the fund.<sup>2</sup> Humble Oil and Friendswood Development, unrepresented members of the class, objected to the award of these additional fees, arguing that the attorneys would be adequately compensated by their private fee arrangements, and that even if the attorneys could properly be compensated from the fund, application must be made by the represented plaintiffs, and not by their attorneys.<sup>3</sup> Further, they contended that in the event that fees should be awarded, the court must first hold an evidentiary hearing to determine the value of the attorneys' services. The United States District Court for the Eastern District of Pennsylvania denied the requested evi-

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1. The nature and history of this litigation are discussed in opinions of the District Court for the Eastern District of Pennsylvania which are listed in *Philadelphia Housing Auth. v. American Rad. & Stand. San. Corp.*, 323 F. Supp. 364, 365 n.1 (E.D. Pa. 1970). Later opinions of the district court, the Third Circuit, and the Judicial Panel for Multidistrict Litigation are listed in *Lindy Bros. Bldrs., Inc. v. American Rad. & Stand. San. Corp.*, 341 F. Supp. 1077, 1079 n.2 (E.D. Pa. 1972).

2. Successful attorneys in class actions are compensated by the so-called salvage fund method. That is, the attorneys salvage a fund shared by the entire class; expenses of litigation and attorneys' fees are paid from this fund. See generally Dawson, *Lawyers and Involuntary Clients: Attorneys Fees From Funds*, 87 HARV. L. REV. 1597 (1974). See also Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 663-65 (1956); Comment, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656, 1672 (1972); Note, *Allowance of Attorneys' Fees From a Fund in Court*, 35 COLUM. L. REV. 740 (1935).

dentiary hearing,<sup>4</sup> concluding that attorneys' fees must be assessed against the fund<sup>5</sup> and that the attorneys themselves could petition directly to receive the value of their services to the unrepresented class members.<sup>6</sup> Humble Oil and Friendswood appealed and the Third Circuit reversed, *holding* that the attorneys were indeed entitled to petition the court directly for fees representing the value of their services to unrepresented class members. The court further held that when a trial judge uses expertise to determine value, if there are disputed facts, there must be an evidentiary hearing to reasonably value, by appropriate standards, the attorneys' services. *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

In the past, a court's general equitable powers provided authority for the award of attorneys' fees when the litigation resulted in a fund benefiting unnamed parties. The Supreme Court of the United States in *Trustees v. Greenough*,<sup>7</sup> enunciated the "equitable fund doctrine" — that is, when one prosecutes a suit which results in a fund being created or salvaged, and other unnamed parties participate in the fund, the active plaintiff is entitled to reimbursement from that fund for expenses and counsel fees in proportion to the benefit conferred upon the nonlitigating beneficiaries<sup>8</sup> because denying the diligent plaintiff this reimbursement would be inequitable.<sup>9</sup> Insofar as a determination of the reasonable value of the expenses and fees was concerned, the Court concluded that the trial court, because of its familiarity with the facts, should have broad discretion.<sup>10</sup>

4. *Id.* at 1083. Indeed, the district court remarked that in assessing the value of an attorney's services a court is itself "an expert on the question and may make its judgment as to the amount to be awarded from its own knowledge and experience of reasonable fees and from the facts before it without the aid of the testimony of witnesses as to value." *Id.* (citations omitted).

5. *Id.* at 1086. The district court reasoned that to allow the nonlitigating claimants against the fund to recover their share without requiring payment of a portion for attorneys' fees "would be to give a free ride to those who expended the least effort." *Id.*

6. *Id.* at 1087. The district court found authority for this position in *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

7. 105 U.S. 527 (1882).

8. *Id.* at 532-33. In *Greenough*, the plaintiff was a bondholder who instituted a suit on behalf of himself and other bondholders to prevent the trustees of the fund securing the bonds from committing waste. *Id.* at 528-29. The litigation resulted in the fund's being "salvaged"; thus, all bondholders were benefited. *Id.* at 532.

9. *Id.* at 532. Indeed, the Court reasoned that to deny the active plaintiff attorneys' fees from the fund

would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he can not be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

In *Central Railroad & Banking Co. v. Pettus*,<sup>11</sup> the Supreme Court refined the *Greenough* principles by holding that while the specific fees awarded were excessive, the lower court could properly award fees from the fund in response to a petition by the attorneys without requiring a prior application to the court by the plaintiff.<sup>12</sup>

In ascertaining the amount of a reasonable fee, as distinguished from passing upon the authority of a court to award the fee,<sup>13</sup> the courts have expressed divergent views in the past.<sup>14</sup> As a source of guidance, the *Code of Professional Responsibility* attempts to summarize broadly the factors relevant to the assessment of a reasonable fee:

The determination of the reasonableness of a fee requires consideration of all relevant circumstances . . . . The fees of a lawyer will vary according to many factors, including the time required, his experience, ability and reputation, the nature of the employment, the responsibility involved and the results obtained.<sup>15</sup>

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11. 113 U.S. 116 (1885). In this class action, the plaintiffs had had a private agreement with the attorneys for payment for services rendered to them, and it was understood that separate arrangements would be made for compensation for services rendered to the nonlitigating members of the benefited class. *Id.* at 125.

12. *Id.* at 124-25. The Court, reasoning from *Greenough*, observed that at the commencement of the litigation,

the unsecured bonds of the Montgomery and West Point Railroad Company were without any value in the financial market. That litigation resulted in their becoming worth all or nearly all, that they called for. The creditors who were entitled to the benefit of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and vigilance of the [petitioning attorneys], so far as the result of litigation may, in any case, be referred to the labors of counsel.

*Id.* at 126.

It has been suggested that attorneys may petition for an award of fees only when their clients have not reimbursed them for services rendered to the other claimants of the fund. Where the clients have agreed to pay for all the services of benefit to the class, then only those clients can petition the court for reimbursement for attorneys' fees. *E.g.*, *Wallace v. Fiske*, 80 F.2d 897, 902, 909-11 (8th Cir. 1935).

13. Authority for the award of attorneys' fees may be conferred by statute as well as by equity. Section 4 of the Clayton Act authorizes a court to award reasonable attorneys' fees to a successful plaintiff in addition to the damages recovered against the defendant. 15 U.S.C. § 15 (1970). Of course, when the plaintiffs represent a class, the attorneys' fees are awarded directly from the damages fund realized. However, in *Lindy Brothers*, a settlement was reached prior to a trial and judgment upon the merits, and section 4 was therefore inapplicable. Also, section 4 refers to the payment of fees by an unsuccessful defendant, whereas in the instant case, fees were sought from the nonlitigating claimants against the fund. *Lindy Bros. Bldrs., Inc. v. American Rad. & Stand. San. Corp.*, 487 F.2d 161, 164 (3d Cir. 1973).

14. Indeed, one commentator has concluded that while reasonable fees are recoverable by statute in antitrust actions, "[j]udging from the reported cases, there are nearly as many notions of what is reasonable as there are judges." Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363, 412 (1954).

15. ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Ethical Consideration* 2-18. For more elaborate discussion of these elements, see *Angoff v. Goldfine*, 270 F.2d 185, 188-89 (1st Cir. 1959) (the courts are governed by the standard of reasonableness with reference to the facts of each case); *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931) (the controlling factors differ from case to case); 6 U. CHI. L. REV. 484 (1936).

In antitrust litigation where the suit has actually gone to judgment, the tendency has been to award reasonable fees upon the basis of a fixed percentage of the damages awarded plaintiff.<sup>16</sup> In the same type of case, other courts have computed a reasonable fee upon the basis of their respective consciences<sup>17</sup> or the free market price — “the figure which a willing successful client would pay a willing successful lawyer”;<sup>18</sup> upon the peculiarities of each case;<sup>19</sup> or in antitrust class actions, upon the basis of the benefits conferred upon the class members.<sup>20</sup> However, regardless of which standard a court may adopt in determining the reasonableness of the fee, a claim for fees under the *Greenough* equitable fund doctrine is quasi-contractual and thus is not subject to the same limitations as a claim for attorneys’ fees as tort damages under the antitrust laws.<sup>21</sup>

With this as its historical scenario, the controversy in *Lindy Brothers* allowed Chief Judge Seitz to discuss attorneys’ fees and their calculation in his opinion for the court. Applying the equitable fund doctrine announced in *Greenough* and *Pettus*, he easily disposed of appellants’ contention that the lower court lacked authority to award fees directly to the attorneys.<sup>22</sup> Therefore, under a quantum meruit analysis, the attorneys were entitled to the reasonable value of their services which had benefited the non-litigating claimants.

However, Chief Judge Seitz disapproved the standards used by the district court to assess the reasonable value of the attorneys’ services as

16. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1962); *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865 (D.D.C. 1955), *rev’d & cross-appeal concerning attorneys’ fees dismissed as moot*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). However, “[t]he rigid requirements of the ‘fixed’ percentage theory, with its insensitivity to individual differences in anti-trust suits, make it inappropriate in the great majority of cases.” Comment, *supra* note 2, at 1662. Or, as one court remarked:

A percentage fee gives undue weight to the size of the recovery. In cases with small recoveries, it completely ignores professional skill and the complexity of the work involved, and could result in an insufficient award for services rendered . . . . Conversely, where the recovery is extraordinarily high, it could result in an excessive award.

*Trans World Airlines v. Hughes*, 312 F. Supp. 478, 484 (S.D.N.Y. 1970) (citations omitted), *modified and aff’d*, 449 F.2d 51 (2d Cir. 1971), *rev’d upon other grounds*, 409 U.S. 363 (1973).

17. See *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952); *Milwaukee Towne Corp. v. Loews, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

18. *Cape Cod Food Prods., Inc. v. National Cranberry Ass’n*, 119 F. Supp. 242, 244 (D. Mass. 1954). *Accord*, *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 297 F. Supp. 924, 926 (D. Me. 1969).

19. *Noerr Motor Freight, Inc. v. Eastern R.R. Pres. Conf.*, 166 F. Supp. 163, 168 (E.D. Pa. 1958), *aff’d*, 273 F.2d 218 (3d Cir. 1959), *rev’d upon other grounds*, 365 U.S. 127 (1961).

20. *Illinois v. Harper & Rowe Publishers, Inc.*, 55 F.R.D. 221, 224 (N.D. Ill. 1972).

21. *Cherner v. Transatron Elec. Corp.*, 221 F. Supp. 55, 58 (D. Mass. 1963). See also Comment, *supra* note 2, at 1672-73. For a list of attorneys’ fee awards in both private and class action antitrust litigation, see Appendix, *id.* at 1679-82.



inadequate and improper<sup>23</sup> and delineated the proper three-step process: First, a court should ascertain the reasonable value of the attorneys' services to the whole class by multiplying the approximate number of hours spent in the litigation by a reasonable hourly rate,<sup>24</sup> since "[t]his figure provides the only reasonably objective basis for valuing an attorney's services."<sup>25</sup> Second, this preliminary figure should be adjusted to account for the contingent nature of success in the action and the quality of the attorneys' work as measured by the amount of the recovery, the trial judge's observations of the attorney, and the novelty and complexity of the issues involved.<sup>26</sup> The final step requires calculating the relative benefit to individual claimants, based upon the percentage of the fund each received.<sup>27</sup> The court said that some of these factors were inapplicable to the instant case because the contingency was slight and success in the litigation had been almost assured.<sup>28</sup> The court further determined that the quality of the attorneys' work should be considered by the trial judge at an evidentiary hearing.<sup>29</sup>

Moreover, the *Lindy Brothers* court concluded that, while a judge ordinarily may pass upon the amount of the fee award without hearing expert testimony,<sup>30</sup> "where the facts to be weighed in light of the judge's expertise are disputed, an evidentiary hearing is required."<sup>31</sup> Therefore, the trial judge's denial of the requested hearing was an abuse of discretion requiring reversal.<sup>32</sup>

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23. *Id.* at 166-67. In determining the reasonableness of the fee, the district court had enlisted the following factors: 1) the percentage of a claimant's recovery awarded in other cases; 2) the amount of the recovery from which fees were being awarded; 3) the amount the attorneys had received from their clients under private agreements; and 4) the time spent by the attorneys upon the case. 341 F. Supp. at 1089-90. The appellate court observed that the trial court failed to explain its application of these criteria. 487 F.2d at 166-67.

24. 487 F.2d at 167. The court reasoned that "[t]he value of an attorney's time generally is reflected in his normal billing rate. A logical beginning . . . is to fix a reasonable hourly rate for his time — taking account of the attorney's legal reputation and status (partner, associate)." *Id.*

25. *Id.*

26. *Id.* at 168.

27. *Id.* at 169. Thus, for example, if it were determined that the reasonable value of the attorney's services to the whole class was \$100,000, and an unrepresented claimant was entitled to 10 percent of the settlement fund, he would be assessed \$10,000 of his recovery for attorneys' fees.

28. *Id.* at 168. In concurrent criminal antitrust action against these defendants, a jury had found those who had pleaded not guilty liable for violating antitrust laws. A criminal conviction after a plea of not guilty is prima facie evidence of violation of the antitrust laws. 15 U.S.C. § 16 (1970).

29. 487 F.2d at 168-69.

30. The court noted:

A judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony such as might establish the value of services rendered by doctors or engineers.

487 F.2d at 169.

31. *Id.*

32. *Id.* at 170. In insisting upon an evidentiary hearing, the appellate court relied upon the Supreme Court's per curiam opinion in *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1969), in holding that the award of attorneys' fees under section 4 of the Clayton

In passing upon the attorneys' petition for fees, the Third Circuit recognized that the litigating claimants also had a cause of action to recover their expenses, including attorneys' fees, from the fund insofar as these expenses had been incurred for the benefit of the whole class.<sup>33</sup> However, because there was no petition by the plaintiffs in *Lindy Brothers*, the court did not pass upon an issue which, it is submitted, might have substantial practical impact upon the calculation of an award of attorneys' fees — to wit, whether the petitioning attorney must remit a portion of his recovery from the nonlitigating claimants' share of the fund for his own client who has paid or will pay a private fee. If the payment to the attorney were, in fact, a reimbursement to the client-plaintiff, the court would probably arrive at a figure different from the one it would were the payment to the attorney merely additional compensation. Indeed, in the equitable fund situation, some courts have awarded fees to petitioning attorneys but have directed that the award be credited against the contractual amount the client-plaintiff owes the attorney. This result has been reached even in the absence of a petition by the client-plaintiff for expenses.<sup>34</sup> However, since the attorney's request for fees is for the attorney's benefit, and not for the client's, the court could have disposed of the issue of client reimbursement simply by declaring the fee award to be only for the attorneys' benefit,<sup>35</sup> thereby leaving intact both the attorneys' private fee arrangements with the client-plaintiffs and their compensation for services benefiting nonlitigating class members.<sup>36</sup>

Moreover, when a court attempts to employ the instant court's analytical framework and proceeds to figure the reasonable value of the

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Act: "The amount of the award for such services should, as a general rule, be fixed . . . by the District Court after hearing evidence as to the extent and nature of the services rendered." *Id.* at 223.

33. 487 F.2d at 165.

34. *In re Continental Vending Mach. Corp.*, 318 F. Supp. 421 (S.D.N.Y. 1970): The *Continental* Court followed *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965), in requiring the attorneys' fees from the fund to be treated as reimbursement to the client-plaintiffs who had had private fee contracts with the attorneys. 318 F. Supp. at 433. Such courts apparently view the request for fees by the attorney as having been made for the benefit of the plaintiffs, whereas in fact such a request is for the attorney's own enrichment.

35. *See, e.g., Wallace v. Fiske*, 80 F.2d 897 (8th Cir. 1935), in which no reimbursement of the client-plaintiff was contemplated or directed.

36. The concept is simple: the attorney, though retained by only some members, has given benefit to all members in the form of the recovered fund. His client has previously contracted, freely and knowingly, to pay for such services; has paid, and has benefited by his participation in the recovered fund. The unrepresented class members, in participating in the fund, are availing themselves of services for which the attorney intended to charge. If the court assesses these members a portion of their recovery for attorneys' fees, these persons are only paying their due. And this amount belongs solely to the lawyer. Likewise, the represented client, by contract and without regard to the other class members, has paid his due. To declare reasonable fees recovered by the petitioning attorney from nonlitigating members as reimbursement to the client-plaintiff would be to make a new contract for the attorney and his client and deny the attorney the reasonable value of his services to nonlitigating class members.

attorneys' services to the whole class, dividing that figure among the class members according to their percentage of the recovery, it will, in part, be estimating the reasonable value of the attorney's services to the client-plaintiff. This estimate will likely differ from the actual contract figure. Thus, the contract price will become implicitly unreasonable because it will be either lower or higher than the court's calculation. One might ask whether the contract then becomes, in effect, unenforceable, and whether this potential voidability of the contract means that in class action suits involving recovery of a fund, the represented members and their attorneys should even bother to contract.<sup>37</sup>

When Chief Judge Seitz' opinion established the method for calculating a reasonable fee by ordering the trial court to multiply the time spent by a "reasonable hourly rate" for each attorney,<sup>38</sup> it appeared unmindful of the potential unfairness to the attorney created by this method of fee determination. As the District Court for the Southern District of New York has observed while assessing attorneys' fees in another complex anti-trust suit, "attributing substantial weight to an hourly rate is unfair in a case such as this where success and complexity of issues are such important factors."<sup>39</sup> Moreover, the court in *Lindy Brothers* observed that it is difficult to calculate actual compensable attorney time.<sup>40</sup> Thus, it determined that the initial reasonable fee must be modified to compensate for the risk created by the contingent nature of success and for the quality of the attorney's work. Unfortunately, such qualifying factors often appear, as one commentator has observed, to be little more than "a means for retrospective justification of the figure that is finally chosen."<sup>41</sup>

While the Third Circuit attempted to devise a flexible formula for figuring reasonable attorneys' fees, it failed to consider the difficult policy problem created by fee awards in antitrust litigation and general class

37. Indeed, the *Lindy Brothers* formula has been applied recently to a contract between the lawyer and his own client which had left the amount of the fee undetermined. *In re Professional Hockey Antitrust Litigation*, 371 F. Supp. 742 (E.D. Pa. 1974).

38. 487 F.2d at 167.

39. *TWA v. Hughes*, 312 F. Supp. 478, 484 (S.D.N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *rev'd upon other grounds*, 409 U.S. 363 (1973). The *TWA* Court concluded:

[T]he major factors bearing on the fixing of attorneys' fees in antitrust cases are the complexity of the problems presented, the skill of counsel, and the measure of success achieved by counsel. The other factors are subsidiary to these and may be helpful in evaluating them, but neither separately nor collectively do these other factors constitute the basis for fixing the fee.

312 F. Supp. at 484.

See also *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865, 865-66 (D.D.C. 1955), *rev'd & cross-appeal concerning attorneys' fees dismissed as moot*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

40. 487 F.2d at 167.

41. Comment, *supra* note 2, at 1661. The author further explained that "although it is a simple matter to state that plaintiff's counsel is a highly respected antitrust attorney, or that counsel displayed unusual skill and competence, it is quite difficult to translate this into a formula for computing attorneys' fees." *Id.*

actions — while it is the “policy of the law in class actions, including anti-trust actions . . . to provide a motive to private counsel,”<sup>42</sup> attorneys often take advantage of class actions to obtain inordinately lucrative fees.<sup>43</sup> Indeed, one commentator has observed that frequently the true beneficiaries of antitrust class actions are the attorneys, not the plaintiff class members, because very large fees reduce the class recovery.<sup>44</sup> This incentive-greed aspect of fee awards was not analyzed by the instant court, except when it quoted *Cherner v. Transitron Electronic Corp.*,<sup>45</sup> to the effect that the bar and bench might be brought into disrepute unless fee awards were checked by time spent and skill displayed.<sup>46</sup> The court should have cautioned that commercial considerations must not be primary in the “ancient and honorable profession,” that “ours is a learned profession not a mere money getting trade . . .”<sup>47</sup>

Because the trial court abused its discretion, the instant court did not determine whether the district court's award of some \$2 million in fees was excessive. Implicitly, the court announced that such a large award might not be excessive if that figure were arrived at when the court's guidelines were used just as the district court in *TWA v. Hughes*<sup>48</sup> found a \$7 million fee award to be proper under its guidelines.<sup>49</sup> While it may be tempting to suggest that the court should have pronounced a multimillion-dollar fee as per se excessive, upon reflection, such enormous fees can be justified — not merely rationalized — when protracted and complex litigation has resulted in a benefit to the public from the enforcement of the antitrust laws, as well as an award of damages to a class. It is not simply that the end alone justifies the fee, but that the successful negotiation of the long,

42. *Illinois v. Harper & Rowe Publishers, Inc.*, 55 F.R.D. 221, 223 (N.D. Ill. 1972), quoting *Manual for Complex & Multi-district Litigation*, proposed § 1.47.

43. *Illinois v. Harper & Rowe Publishers, Inc.*, 55 F.R.D. 221, 224 (N.D. Ill. 1972). See also Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975), in which the author is highly critical of the overpayments made to lawyers when they receive fees reflecting the size of the fund recovered (in effect, a sort of profit-sharing), rather than the fair value of the attorney's services.

44. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 10 (1971). The author noted that when the fund is created by an out-of-court settlement so that the attorneys' fees are deducted from the fund itself, excessive fees have a direct impact upon the value of the claimant's recovery. In addition, even where the case reaches judgment and the defendant pays the fee, the defendant's litigation expenses are costs of doing business which are passed on to the consumer. In either case, large attorneys' fees tend to defeat the purposes of the antitrust laws. *Id.*

45. 221 F. Supp. 55 (D. Mass. 1963).

46. 487 F.2d at 168, quoting *Cherner v. Transitron Elect. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963).

47. ABA CANONS OF PROFESSIONAL ETHICS NO. 2 n.54, quoting ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 250 (1943). It has been observed that high counsel fees excite the indignation of those whose money is used, and “the justified outrage of the public if a court should use other people's money to make an award equal to what ordinarily is earned only over many years as compensation for services that took a short time to perform.” *Cherner v. Transitron Elect. Corp.*, 221 F. Supp. 55, 62 (D. Mass. 1963).

48. 312 F. Supp. 478 (S.D.N.Y. 1970).

49. *Id.* at 485.

tortuous means to that end warrants the amount. Thus, the court could not properly have passed upon the excessiveness of fees until those means were analyzed at the evidentiary hearing.<sup>50</sup>

The Third Circuit, while adhering to the equitable fund doctrine, has attempted to formulate guidelines for the award of fees in antitrust class action settlements. The formula is flexible but imprecise; and does not coincide with the views of other courts.<sup>51</sup> While, upon the facts of this case, the court could not properly have passed upon the amount of the district court's fee award, it failed to consider in any detailed way the relationship of the fee award to the lawyer's professional responsibility and public image. Nevertheless, the court's formula does provide a method for calculating the amount a lawyer can successfully seek as a fee in such litigation, while its requirement of the evidentiary hearing distinguishes the opinion by providing both a bridle for the trial judge's discretion and a potentially effective check upon excessive fees.

Frederick Haase

#### FEDERAL JURISDICTION — THE FEDERAL TORT CLAIMS ACT GIVES PLAINTIFF A RIGHT TO SUE FOR A BREACH OF THE DUTY TO MAINTAIN ACCURATE EMPLOYMENT RECORDS.

##### *Quinones v. United States* (1974)

Plaintiff, a former employee of the federal government, brought suit under the Federal Tort Claims Act<sup>1</sup> (FTCA) alleging damages stemming from the government's negligence in maintaining inaccurate employment records and in disseminating inaccurate information to plaintiff's prospective employers. After having been employed by the Bureau of Narcotics and Dangerous Drugs for approximately 8 years, compiling a superior record, and receiving several promotions and commendations, he resigned when personal reasons made it impossible for him to accept a transfer.<sup>2</sup> In his

50. 487 F.2d at 166 n.10.

51. See notes 16-20 and accompanying text *supra*. *Lindy Brothers* has been favorably noted by Professor Dawson because the court's novel formula prevents attorneys from being profit-sharers in the funds they recover. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 925 (1975). *Lindy Brothers* has been cited with approval in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) and *Liebman v. J.W. Peterson Coal & Oil Co.*, 1974 Trade Cas. 96,974 (N.D. Ill. 1974). See also *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974), in which the *Lindy Brothers* formula was extended to an antitrust class action settlement in which the fee awards were based, not on the *Greenough* equitable fund theory, but on the defendant's express promise to pay the plaintiffs' attorneys.

1. 28 U.S.C. §§ 1346 *et seq.* (1970).

2. *Quinones v. United States*, 492 F.2d 1269, 1272 (3d Cir. 1974).

complaint, plaintiff alleged that, although he left the Government as an employee in good standing, all of his applications for subsequent employment had been rejected because of the adverse comments contained in his work record regarding his performance.<sup>3</sup> Plaintiff's suit, brought under FTCA section 1346(b),<sup>4</sup> argued that the Government, having assumed the status of plaintiff's employer, and being required to maintain employment records,<sup>5</sup> implicitly undertook the obligations of maintaining them accurately and accurately representing plaintiff's employment history to prospective employers.<sup>6</sup> The district court dismissed for lack of subject matter jurisdiction,<sup>7</sup> reasoning that since the interest sought to be protected — freedom from injury to one's reputation — was identical to that protected by rights of action for defamatory torts, the action was barred by the section 2680(h) libel-slander exception to liability under the FTCA.<sup>8</sup>

The Third Circuit, while agreeing that dissemination of inaccurate employment history was libel and therefore within the section 2680(h) exception, reversed, *holding* that the duty to maintain accurate employment records existed and could be enforced through an action based upon a general negligence theory. *Quinones v. United States*, 492 F.2d 1269 (3d Cir. 1974).

By recognizing that the duty to maintain accurate employment records was actionable under section 1346(b), the instant court further reduced the area of sovereign immunity from actions in tort, an area which has

3. *Id.* at 1272. Plaintiff alleged that the immediate causes of his rejection for employment were the adverse comments made by his government superiors. *Id.* He further alleged that the Bureau had failed to keep accurate records of his employment history. *Id.* However, plaintiff did not allege that the comments made by his superiors to prospective employers reflected any of the inaccuracies in plaintiff's employment record.

4. The FTCA provides in pertinent part:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1970).

5. Pursuant to Executive Order No. 10,561, 3 C.F.R. § 205 (1954), the Civil Service Commission issued regulations which required each executive agency to establish an official personnel folder for each employee. 5 C.F.R. §§ 293.201 *et seq.*, 294.101 *et seq.* (1974).

6. 492 F.2d at 1272.

7. *Id.* at 1271.

8. *Id.* Section 2680(h) provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”

been gradually diminished since the FTCA was passed in 1947 in an effort to streamline the method of redress for tort claims pressed against the United States.<sup>9</sup> However, Congress did embody in section 2680 a number of specific exceptions to this waiver of sovereign immunity.<sup>10</sup> Although the Supreme Court of the United States encouraged the courts to "give hospitable scope"<sup>11</sup> to the FTCA's waiver of sovereign immunity, lower courts, when faced with a choice between expanded governmental liability and sovereign immunity, have generally been cautious, tending to view the action as barred by one of the section 2680(h) exceptions.<sup>12</sup>

The Supreme Court indicated the limits of its "hospitality" by its resolution of the issues in *United States v. Neustadt*,<sup>13</sup> where it held that the misrepresentation exception of section 2680(h) barred plaintiff's recovery for damages caused by his reliance upon an FHA inspection which he claimed was negligently made.<sup>14</sup> More important than the case's actual holding, however, was the Court's approach to statutory interpretation. While the circuit court viewed plaintiff Neustadt's reliance upon the misrepresentation as merely the means by which the damage caused by the government's negligence inspection was occasioned,<sup>15</sup> the Supreme Court made it clear that it considered the complaint's allegations of negligence as

9. Prior to the passage of the FTCA, tort claimants had to seek redress through the introduction of a private bill in Congress — a method which had become increasingly cumbersome by 1947. Gelhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 724 (1947). For a further analysis of the impact of the FTCA, see 2 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* §§ 260.01-06 (Supp. 1974).

10. 28 U.S.C. §§ 2680(a)-(n) (1970). In addition to providing immunity for libel, slander, and other torts listed in section 2680(h) the FTCA also bars recovery for other wrongs, including claims arising from the exercise of or failure to exercise a discretionary function, claims resulting from the imposition of a quarantine, and claims connected with the activities of certain governmental departments. *Id.*

11. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949).

12. *E.g.*, *United States v. Shiveley*, 345 F.2d 294, 297 (5th Cir.), *cert. denied*, 382 U.S. 883 (1965) (claim for bodily injuries barred by the section 2680(h) assault and battery exception despite government negligence in issuing gun to the actor); *Moos v. United States*, 225 F.2d 705, 706 (8th Cir. 1955) (suit for damages for unauthorized surgery precluded by battery exception to section 2680(h) despite clear showing of government negligence); *Davidson v. Kane*, 337 F. Supp. 922, 924 (E.D. Va. 1972) (claim dismissed as within false imprisonment exception of section 2680(h) despite allegation of Government negligence in hiring and training those who falsely imprisoned plaintiff).

13. 366 U.S. 696 (1961), *rev'g* 281 F.2d 596 (4th Cir. 1960).

14. 366 U.S. at 711.

15. *United States v. Neustadt*, 281 F.2d 596, 602 (4th Cir. 1960). The circuit court reasoned:

[W]e do not think that the government is necessarily absolved from liability in every case of wrongful conduct on its part which *incidentally embraces misrepresentation*. . . . Quite clearly the gist of the offense in this case was the careless making of an excessive appraisal so that the home seeker, whom the Commissioner was obligated to protect, was deceived and suffered substantial loss. This was the gravamen of the offense to which the report of the Commissioner was merely

mere attempts circumventing the bar created by section 2680(h).<sup>16</sup> The difference in the two courts' modes of analysis is found in the tendency of the circuit court to construe the exceptions of section 2680(h) as narrowly as possible, guided as much by public policy considerations as by the FTCA's literal prescriptions.<sup>17</sup> The Supreme Court nonetheless evidenced a reluctance to erode the protection of sovereign immunity and refused to go beyond the literal wording of the statute. The scope of the FTCA, the Court pointed out, depends "solely upon what Congress meant by the language it used in § 2680(h)."<sup>18</sup>

The mode of analysis employed in *Neustadt* militated against any expansion of the government waiver of immunity. If the facts of a particular case were such that the cause of action could be characterized as being within the exceptions of section 2680(h), courts looked no further for other possible theories of liability not barred by that section.<sup>19</sup> This approach made the Third Circuit's holding in *Gibson v. United States*<sup>20</sup> significant, because the court construed the FTCA in favor of government liability rather than sovereign immunity.

Gibson, a federal employee, sought damages under the FTCA for injuries sustained when he was attacked by a Job Corps trainee. It was alleged that such attacks had occurred in the past, but that the government had taken no precautions to prevent them.<sup>21</sup> The district court dismissed, finding that the case was within the assault and battery exception of section 2680(h).<sup>22</sup> The Third Circuit reversed, reasoning that "*under the circumstances*" the possibility of such attacks was part of the risk which the

16. 366 U.S. at 703. The Court observed:

[T]he argument has been made by plaintiffs, and consistently rejected by the courts, until this case, that the bar of § 2680(h) does not apply when the gist of the claim lies in *negligence* underlying the inaccurate representation. . . . But this argument . . . is nothing more than an attempt to circumvent § 2680(h) by denying that it applies to negligent misrepresentation.

*Id.* (emphasis supplied by the court).

17. The circuit court observed: "The real question is whether it was the intent of Congress to absolve the government from liability in every case in which misrepresentation plays merely a part." 281 F.2d at 601.

The circuit court went on to conclude:

It is abhorrent to common sense to hold that the government can relieve itself from liability for neglect of duty owed to an individual merely by telling him falsely that the duty has been faithfully performed; and it cannot be supposed that Congress had any such idea in mind when it included "misrepresentation" among the exceptions to the statute.

*Id.* at 602.

18. 366 U.S. at 706.

19. See note 12 *supra*. The position of the federal courts strictly construing the government's waiver of immunity is not unusual. As one commentator noted: "[s]o strongly entrenched in the judicial mind is the principle of immunity in tort that legislative consent to suit, though granted in the broadest language, has been deemed to exclude liability for tort." Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 9 (1924).

20. 457 F.2d 1391 (3d Cir. 1972).

21. *Id.* at 1392.



government failed to guard against,<sup>23</sup> and as such, the attack was not "such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries."<sup>24</sup> The *Gibson* court's approach was noteworthy because, although the attack clearly amounted to an assault and battery which was within the scope of the section 2680(h) exceptions, the court did not simply end its inquiry; rather it went further and asked whether the gist of the action was assault and battery or negligence.<sup>25</sup> The court reasoned:

[I]t is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.<sup>26</sup>

The court concluded that "the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence."<sup>27</sup> Thus, the *Gibson* court, in determining the scope of liability under the FTCA, looked beyond the definitional limits of the section 2680(h) exceptions to the circumstances giving rise to the harm, and by its emphasis upon negligence as the gravamen of the action, effectively widened the Government's waiver of immunity, at least in those cases where negligence caused bodily harm.

Considered in conjunction with *Gibson* and the earlier *Neustadt* decision, *Quinones* takes on increased importance, as, without seeming to depart radically from the *Neustadt* rationale, it chips away at the exceptions to governmental liability.

After having preliminarily decided that plaintiff's action would not be barred by Pennsylvania law,<sup>28</sup> the *Quinones* court proceeded to the central issue: whether plaintiff had stated a cause of action under the FTCA.<sup>29</sup> As had the *Gibson* tribunal, the *Quinones* court focused upon the "type of governmental activity which might cause harm rather than the type of harm caused"<sup>30</sup> as the criterion for determining whether the action fell within the section 2680(h) exceptions. The court observed that Executive Order Number 10,561 required each executive agency to establish and maintain a personnel file for each employee.<sup>31</sup> Furthermore, the court ob-

23. *Id.* at 1395 (emphasis supplied by the court).

24. *Id.* (emphasis supplied by the court).

25. *Id.* It is interesting to note that the Fifth Circuit recognized but found it unnecessary to resolve the problem of distinguishing between unanticipated intentional torts and the intentional acts of a third party which bring about a foreseeable harm, when it dismissed for lack of jurisdiction in *United States v. Shiveley*, 345 F.2d 294, 297 (5th Cir.), *cert. denied*, 382 U.S. 883 (1965). In contrast, the *Gibson* court squarely met this issue. 457 F.2d at 1395.

26. 457 F.2d at 1395, citing *Harper & Kime, The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 898 (1934).

27. 457 F.2d at 1395.

28. 492 F.2d at 1273-79. The FTCA specifically imposes liability upon the Government "in accordance with the law of the place where the act or admission occurred." 28 U.S.C. § 1346(b) (1970).

29. 492 F.2d at 1279.

30. *Id.* at 1280.

31. *Id.* at 1277. See note 5 *supra*.

served, the Civil Service Commission's *Federal Personnel Manual* itself directed that "the utmost care be taken and that all necessary precautions be taken to safeguard the folder and its contents."<sup>32</sup> Based upon their examination of these materials, the court concluded:

Since the regulations contemplate the dissemination of information to prospective employers and impose certain safeguards, a risk of injury to an employee's reputation is contemplated. Thus, it follows that there arises a corresponding duty to use reasonable care in maintaining the accuracy of the records.<sup>33</sup>

Therefore, since the dissemination of the information was foreseeable, it was not a supervening event which would relieve the Government of liability for its negligence in maintaining inaccurate records.<sup>34</sup> Just as the assault and battery exception of section 2680(h) did not relieve the Government of responsibility for its negligence in guarding against such attacks in *Gibson*, the libel exception was found not to protect it from liability for maintaining inaccurate records whose dissemination was clearly contemplated.<sup>35</sup> Indeed, the *Quinones* court appeared to be expanding the *Gibson* rationale to those cases where the harm complained of was economic rather than physical. The court reaffirmed the protection due to such economic interest when it noted that "[a]lthough negligence law is generally associated with bodily or physical injuries, there is no conceptual impediment to the recovery for non-traumatic injury."<sup>36</sup> Thus, in recognizing a duty in the Government to maintain accurate employment records, the court said it did nothing more than "continue 'in the tradition of spinning out applications of accepted precedents . . .'"<sup>37</sup> — specifically, *Gibson*.

Although the court appeared to favor the reasoning adopted in *Gibson*, it could not ignore the mode of analysis used in *Neustadt*.<sup>38</sup> Therefore, the court sought to limit *Neustadt* to its facts and to distinguish it from *Quinones*, reasoning:

As the tort of misrepresentation differs conceptually from the tort of deceit, the tort of negligently maintaining the personnel records of an employee differs from the defamatory torts of libel and slander.

32. 492 F.2d at 1277, quoting *Federal Personnel Manual* 293-7, -8 (court's emphasis omitted).

33. 492 F.2d at 1277. The court, however, added a caveat to its finding of a duty to maintain accurate information when it noted:

By finding that the United States does owe plaintiff a duty of reasonable care in the maintenance of his personnel folder, we do not indicate the precise bounds of the government's duty, nor intimate that the duty is breached merely by permitting inaccurate information to be filed or by failing to file pertinent information. Questions of breach of duty and causation . . . will be considered by the district court on remand.

*Id.*

34. *Id.*

35. *Id.* at 1281.

36. *Id.* at 1278 & n.25.

37. *Id.* at 1278, quoting Keeton, *Judicial Law Reform — A Perspective in the* *Barryman's Legal Research Center*, 15 *Legal Studies* 1254, 1254-55 (1966).

38. See notes 14-18 and accompanying text *supra*.

But here the resemblance between this case and . . . *Neustadt* . . . comes to an end. Here only "libel, slander" are specifically excluded; generic negligent claims are not. In *Neustadt* . . . there was a specific statutory exclusion of "misrepresentation"; here there is no express exclusion of the remedy pursued.<sup>39</sup>

The distinction, however, is superficial because it assumes the very question in contention. Essentially, the problem was not whether the prohibition of section 2680(h) extends specifically to the tort of negligently maintaining employment records but whether such an action is in fact distinguishable from an action in libel, the label of negligence notwithstanding. For although the court recognized a duty upon the part of the Government to maintain accurate records, there can be no demonstration of damage from a breach of that duty, and thus no action maintained for negligence,<sup>40</sup> without proof of dissemination of the information in those records. As in *Quinones*, such dissemination is usually intentional, and therefore technically libel.<sup>41</sup> Thus, the *Quinones* court was confronted by a problem similar

39. 492 F.2d at 1280.

40. F. HARPER, A TREATISE ON THE LAW OF TORTS § 129 (1933). "Even though the defendant was negligent toward the plaintiff, he is not liable because he has committed no legal wrong if his negligence legally caused no harm . . ." *Id.* at 283. See also W. PROSSER, THE LAW OF TORTS § 30 (4th ed. 1971).

41. 492 F.2d at 1275. In Pennsylvania, libel has been defined as "a maliciously written or printed publication which tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 441, 273 A.2d 899, 904 (1971). See also *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 317-18, 182 A.2d 751, 753 (1962); *Schnabel v. Meredith*, 378 Pa. 609, 612, 107 A.2d 860, 862 (1954). Therefore, the court began its analysis with two inquiries: whether the Pennsylvania law of libel and slander would preempt plaintiff's claim in negligence; and, if not, whether plaintiff's allegations would constitute a cause of action in negligence under Pennsylvania law. 492 F.2d at 1273. Since there was no Pennsylvania case dealing with the precise question involved in *Quinones*, the court attempted to rule as they reasoned the Supreme Court of Pennsylvania would have ruled. *Id.* at 1273, citing *Gerr v. Emrick*, 283 F.2d 293, 294 (3d Cir. 1960), cert. denied, 365 U.S. 817 (1961). In response to the first question, the *Quinones* court reasoned that although the interest asserted by the plaintiff and the interest protected by the rights of action for the torts of libel and slander were the same — the interest in reputation — the theory upon which the intentional torts of libel and slander proceeded was far different from the theory of negligence upon which plaintiff's claim was based. 492 F.2d at 1273-76. The court further observed that plaintiff was not restricted to the choice of one remedy. *Id.* at 1275, citing *Rogers v. United States*, 397 F.2d 12, 15 (4th Cir. 1968). The court therefore concluded that the Pennsylvania courts would not view the defamatory torts as preemptive of an action in negligence based upon a failure to maintain accurate employment records. 492 F.2d at 1276.

Having decided that the Pennsylvania law of libel and slander would not bar plaintiff's action, the court then turned to the question of whether plaintiff's complaint stated a cause of action in negligence. After reviewing the principles governing the standard of care in general, and analyzing the federal regulations mandating the maintenance of employment records, the court concluded "that the state courts would recognize a duty of the defendant personal to the plaintiff to use due care in keeping and maintaining employment records." *Id.* at 1276-77, 1278. The requirement of legal malice is satisfied by "a wrongful act done intentionally, without just cause or excuse." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 441, 273 A.2d 899, 904 (1971). Thus, it is not necessary that the act be done with any manifestation of ill will but merely that the publication be intentional.

to that faced by the lower court in *Neustadt*:<sup>42</sup> is the action primarily one for negligence and is the showing of intentional dissemination merely incidental; or is it a libel action, the breach of the duty to maintain accurate records being "negligence in the air"?<sup>43</sup> Unlike the Supreme Court in *Neustadt*, the *Quinones* court found the action to be based upon negligence, reasoning:

The gravamen of plaintiff's complaint, as recognized by the district court, was the "BNDD's alleged failure to maintain adequate employment records . . . ." [*sic*] It is not the publication of the incorrect employment history and record that serves as the foundation of plaintiff's complaint; it is the method in which the defendant maintained the record of his employment that is being criticized.<sup>44</sup>

Certainly, however, the facts of the *Quinones* case do not necessarily suggest an action in negligence rather than one in libel.<sup>45</sup> Other courts, when faced with antecedent negligence of a most compelling sort, have found that section 2680(h) nonetheless barred a claim against the Government.<sup>46</sup> One example is *Duenges v. United States*,<sup>47</sup> in which the district court dismissed, for failure to state a cause of action, a complaint alleging government negligence for failing to keep plaintiff's military records properly.<sup>48</sup> Upon the basis of the inaccurate information contained in his file, plaintiff was jailed as a deserter and consequently suffered humiliation, mental distress, and lost wages.<sup>49</sup> The *Duenges* court concluded that plaintiff could show no damage from the Government's failure to maintain accurate service records; rather, the alleged injuries occurred as a result of the plaintiff's unjust imprisonment.<sup>50</sup> Hence, the *Duenges* court viewed the gist of that action as false imprisonment barred under section 2680(h).<sup>51</sup> Just as

42. See note 17 *supra*.

43. F. POLLOCK, *THE LAW OF TORTS* 472 (10th ed. 1916). The fact that the actor is guilty of negligence toward the plaintiff is irrelevant — mere "negligence in the air" — unless it can be shown that the actor's negligence caused or materially contributed to the plaintiff's injuries. *Id.*, citing *Wakelin v. L. & S.W.R. Co.*, 56 Law J.Q.B. 229 (1868).

44. 492 F.2d at 1276.

45. Although plaintiff alleged that his rejection for subsequent employment was caused by his superior's adverse comments, and the information filed in the employment file was inaccurate (see 492 F.2d at 1272), plaintiff did not allege that his superior utilized the employment records as a basis for the adverse comments. In the absence of a showing that the inaccuracies in the file actually caused the inaccuracies in his superior's statements, plaintiff's action would be for libel rather than negligence. See note 41 and accompanying text *supra*.

46. See note 12 *supra*. It should also be noted that the *Quinones* court not only viewed the action as sounding in negligence, but recognized that the Government, as any other employer, was under a duty to maintain accurate employment records. 492 F.2d at 1277. This contrasts with earlier decisions where even a well established duty could not circumvent the section 2680(h) exceptions. See note 12 *supra*.

47. 114 F. Supp. 751 (S.D.N.Y. 1953).

48. *Id.* at 752.

49. *Id.*

50. *Id.*

51. *Id.*

Duenges' injury could be traced to his imprisonment rather than the Government's negligence in maintaining inaccurate records, so too could Quinones' damage be deemed a result of the dissemination rather than the compilation of inaccurate records. Thus, the *Quinones* court's finding of jurisdiction, in contrast to those in the *Duenges* and *Neustadt* cases, cannot be accounted for by factual differences. The *Quinones* decision was the result of a shift in emphasis from the exceptions to governmental liability embodied in section 2680(h), to a more inclusive view of governmental responsibility based upon section 1346(b). The key to the *Quinones* court's reasoning lies in its use of the Supreme Court's sweeping language in *United States v. Muniz*:<sup>52</sup>

"[T]he Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The FTCA extends to novel and unprecedented forms of liability as well."<sup>53</sup>

The Third Circuit adopted the *Muniz* conclusion as its own "[W]e should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress."<sup>54</sup> Such language reveals the instant court's opinion that, in order to effectuate the purpose of the FTCA, courts must favor the finding of jurisdiction and interpret the immunity provision of section 2680(h) narrowly.

However, it must be noted that the *Quinones* court, while limiting the section 2680(h) exceptions, did not abrogate them. This is clearly indicated by the court's firm rejection of any government duty to disseminate accurate information.<sup>55</sup> In rejecting this duty, the court could perhaps be accused of drawing "distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation,"<sup>56</sup> because the duty to maintain accurate information seems inextricably intertwined with the duty to disseminate accurate information. In reality, however, the latter duty is much broader. Dissemination of inaccurate information does not necessarily imply that there has been negligence in compiling that information. Thus, no recognized duty would be breached when a government official, although having access to accurate employment records, disseminated inaccurate information. The dissemination of information, rather than simply being an incidental showing in a wider negligence action, would itself be the core of the action making it a libel action.<sup>57</sup> The *Quinones* court, therefore, in rejecting the duty to disseminate accurate information, emphasized that it is only in those cases where the showing

52. 374 U.S. 150 (1963).

53. *Id.* at 159. See 492 F.2d at 1279.

54. 492 F.2d at 1280, quoting *United States v. Muniz*, 374 U.S. 150, 165 (1963).

55. 492 F.2d at 1281.

56. *Id.* at 1279, quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 68

(1955).

57. See note 41 *supra*.

of dissemination is incidental to a larger negligence action that the action will lie under section 1346(b).

It is difficult to judge the impact of *Quinones* because while evidencing some change in judicial interpretation of the FTCA, the case may well be limited to its particular facts. Standing alone, the decision indicates little more than that the exceptions of section 2680(h) will not relieve the Government of its duty to maintain accurate employment records. However, when considered in conjunction with *Gibson*, the *Quinones* decision may evidence a tendency, at least in the Third Circuit, to hold that whenever there has been a convincing showing of the Government's antecedent negligence, the court will view the action as within the parameters of section 1346(b), rather than barred by the section 2680(h) exceptions. Such an analysis would seem to comport with the broad policy underlying the FTCA which recognizes government responsibility to a plaintiff "under circumstances where the United States, if a private person, would be liable to the claimant . . . ." <sup>58</sup> Indeed, there is evidence to suggest that in applying the section 2680(h) exceptions narrowly to provide the Government immunity only from the purely intentional torts of its employees, the Third Circuit was facilitating the original congressional intent in formulating such exceptions.<sup>59</sup> Therefore, rather than being judicial legislation in derogation of the purpose behind the FTCA, the *Quinones-Gibson* approach might actually be an effectuation of the congressional intent. At this point, however, whether the *Quinones* decision is viewed as providing a new approach to the interpretation of FTCA or is limited to its facts, is mere speculation; future courts must determine its actual ramifications.

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58. 28 U.S.C. § 1346(b) (1970). The Supreme Court recognized this policy when it said:

The broad and just purpose which [section 1346] was designed to effect was to compensate victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955).

59. S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946), "[S]ection [2680] specifies types of claims which would not be covered by the title. They include . . . *deliberate torts* such as assault and battery; and others." *Id.* (emphasis added).

It would seem therefore that in formulating such exceptions, Congress intended to exempt the Government from liability only for those torts which were purposely perpetrated, not those activities where the risk created by the Government's negligence materialized through subsequent employee activity.

CRIMINAL PROCEDURE — RULE 11 AND SECTION 2255 — EVIDENTIARY HEARING REQUIRED TO DETERMINE VOLUNTARINESS OF GUILTY PLEA WHEN PETITIONER ALLEGES AN OUT-OF-COURT AGREEMENT WITH PROSECUTOR WHICH DIFFERS FROM THE SENTENCE PRO-  
NOUNCED BY THE COURT.

*United States v. Valenciano* (1974)

Defendant was indicted in the United States District Courts for the Districts of Florida and New Jersey for narcotics offenses.<sup>1</sup> He consented to a transfer of the Florida indictment to the United States District Court for the District of New Jersey<sup>2</sup> and pleaded guilty, during proceedings conducted pursuant to rule 11 of the Federal Rules of Criminal Procedure,<sup>3</sup> to one count in the New Jersey indictment and to the Florida indictment.<sup>4</sup> Defendant received consecutive sentences of 5 years upon the Florida indictment and 2 years upon the New Jersey indictment,<sup>5</sup> and a statutorily required special parole term of 3 years.<sup>6</sup> After sentence was imposed, defendant moved to withdraw his guilty plea<sup>7</sup> and requested a hearing

1. *United States v. Valenciano*, 495 F.2d 585, 586 (3d Cir. 1974). The statute for violation of which defendant was convicted provides in pertinent part:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. § 841(a) (1970).

2. The Federal Rules of Criminal Procedure provide as herein relevant: A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment is pending, and to consent to disposition of the case in the district in which he was arrested or is held, subject to the approval of the United States attorney for each district . . . .

FED. R. CRIM. P. 20(a).

3. Rule 11 provides in part:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea.

FED. R. CRIM. P. 11.

4. 495 F.2d at 586.

5. *Id.*

6. *Id.* Section 841(b)(1)(A) provides in pertinent part:

Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of . . . a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment . . . .

21 U.S.C. § 841(b)(1)(A) (1970).

7. Rule 32(d) of the Federal Rules of Criminal Procedure provides:

A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

FED. R. CRIM. P. 32(d).

pursuant to section 2255,<sup>8</sup> contending that the record of the rule 11 plea hearing failed to disclose that prior to sentencing his attorney had informed him of an agreement with the prosecutor providing for concurrent sentences,<sup>9</sup> and this agreement had induced his plea.<sup>10</sup> He also claimed that his attorney had not mentioned the special parole term when the plea agreement was revealed,<sup>11</sup> and that he was aware of neither the consecutive sentences nor the special parole term until he arrived at the United States Penitentiary.<sup>12</sup>

At the rule 11 plea hearing, conducted through a Spanish-speaking interpreter,<sup>13</sup> Valenciano's counsel reported that he had reached an agreement, encompassing one New Jersey count and the Florida transfer,<sup>14</sup> with the United States Attorney, which he had communicated to Valenciano. His attorney further stated that Valenciano wished to make a voluntary profession of guilt in open court, although counsel stated that he had made no promises to defendant regarding the sentence but rather that Valenciano had been informed and understood that he could receive a maximum sentence.<sup>15</sup> The court, through Valenciano's interpreter, questioned him directly as to his guilt and his understanding of the consequences of his guilty plea, cautioning him that he was giving up certain constitutional rights by pleading guilty.<sup>16</sup> Valenciano responded that no one had threatened him or promised him anything as an inducement for

8. 495 F.2d at 586. Section 2255 provides in pertinent part:

A prisoner . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing . . . 28 U.S.C. § 2255 (1970). For a discussion of post-conviction remedies, see Hunter, *Post Conviction Remedies*, 50 F.R.D. 153 (1971).

9. Appellant alleged an agreement between his attorney, the United States Attorney for the District of New Jersey, and the United States Attorney for the Southern District of Florida about a rule 20 transfer of his case. Brief for Appellant at 3. See note 2 *supra*. The alleged agreement was that petitioner would receive a 5-year sentence upon the New Jersey indictment and 2 years upon the Florida indictment, to run concurrently. Brief for Appellant at 3. 495 F.2d at 586.

10. Brief for Appellant at 4.

11. *Id.*

12. *Id.* Valenciano also claimed the court responded to his letters of protest by saying nothing could be done. *Id.*

13. 495 F.2d at 586.

14. *Id.*

15. *Id.* at 587.

16. *Id.* The record of the rule 11 plea proceedings contained the following exchange:

Q. Now, do you know that by pleading guilty to Count 2 you are subjecting yourself to penalties of \$25,000 fine and fifteen years in prison?

A. Yes, your Honor.

Record of rule 11 Plea Proceedings at 7. This is the maximum sentence for a person without a prior conviction specified by section 841, 21 U.S.C. § 841(b)(1)(A) (1970). The judge made no mention of the special parole term which was also mandated by this section. See note 6 *supra*. For a discussion of the significance of this omission, see notes 58-62 and accompanying text *infra*.



his guilty plea, and that there was no understanding or sentence agreement with any judge, lawyer, or prosecutor.<sup>17</sup>

The district court denied both the defendant's request to withdraw his guilty plea and his request for an evidentiary hearing because it considered Valenciano's petition to be based solely upon an allegation of inaccurate assurances of counsel,<sup>18</sup> and therefore barred by the Third Circuit's holding in *Masciola v. United States*<sup>19</sup> that "[i]naccurate assurances by counsel, or erroneous expectations of defendant, as to sentencing are not in and of themselves grounds for reversal of a conviction or for permission to withdraw a guilty plea."<sup>20</sup>

The Third Circuit reversed the district court's denial of the request for an evidentiary hearing and remanded for such a hearing *holding* that *Masciola* was limited to its particular facts and did not affect the vitality of *Moorhead v. United States*,<sup>21</sup> which had held that because any guilty plea induced by out-of-court misrepresentations regarding a plea bargain with the prosecution did not meet constitutional standards of voluntariness, a defendant was entitled to a section 2255 hearing to determine the veracity of his allegations that his plea was so induced, regardless of the ostensible regularity of the rule 11 plea proceedings. *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974).

In 1972, the United States Supreme Court in *Santobello v. New York*,<sup>22</sup> specifically approved plea bargaining discussions attempting to reach an agreement whereby the defendant would plead guilty in exchange for certain charge or sentence concessions.<sup>23</sup> The Court noted that this practice was an "essential component of the administration of justice,"<sup>24</sup> and that "[p]roperly administered, it is to be encouraged."<sup>25</sup> However, the *Santobello* Court also cautioned that plea agreements must be made fairly, and if induced by promises, they must be made known.<sup>26</sup> The basic requirement for the acceptance of a guilty plea is that the defendant enter

17. 495 F.2d at 587.

18. *Id.* at 586.

19. 469 F.2d 1057 (3d Cir. 1972).

20. *Id.* at 1058.

21. 456 F.2d 992 (3d Cir. 1972).

22. 404 U.S. 257 (1972). In *Santobello*, the state had failed to keep a commitment concerning a sentence recommendation when another prosecutor replaced the one who had negotiated the plea. *Id.* at 259. The Supreme Court vacated the sentence and remanded to the state court to decide whether the circumstances of the case required only that there be specific performance of the agreement upon the plea or whether the petitioner should be allowed to withdraw his plea. *Id.* at 262-63.

23. See generally Introduction, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (Approved Draft, 1968) and Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

24. 404 U.S. at 260.

25. *Id.*

26. *Id.* at 261-62. While there is no absolute right to have a guilty plea accepted, the Third Circuit has held that once a plea bargain is disclosed, if the judge should determine that justice would not be served by accepting the bargain, the defendant should be permitted to withdraw his plea. *United States ex rel. Culbreath v. Rundle*, 466 F.2d 730, 735 (3d Cir. 1972).

into it knowingly and voluntarily.<sup>27</sup> The Supreme Court in *Brady v. United States*<sup>28</sup> adopted a standard for the voluntariness of guilty pleas which required that the defendant be "aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel" and that his plea must not be "induced by threats . . . misrepresentation (including unfulfilled or unfulfillable promises)," or improper promises.<sup>29</sup>

Following *Brady*, the question remained whether a guilty plea is involuntary when the defendant pleads guilty solely because of inaccurate assurances by his own counsel without any mention of promises by the prosecutor. In this situation, the principle enunciated by the Tenth Circuit in *Wellnitz v. Page*<sup>30</sup> — that an erroneous prediction of sentence alone does not render a guilty plea involuntary — requires a denial of the petition to withdraw a plea. Similarly, bad advice,<sup>31</sup> assurances of leniency,<sup>32</sup> or promises of concurrent sentences,<sup>33</sup> given only by defendant's counsel, do not render a plea involuntary. While it may be argued that a defendant who relied upon his own attorney's statements did not make a voluntary plea because he was not fully aware of "the actual value of any commitment made to him by . . . his own counsel,"<sup>34</sup> it is submitted that the *Wellnitz* principle reflects judicial recognition of the fact that most defendants will place greater reliance upon a promise made by the prosecution than upon a promise made by their own counsel. To allow the defendant's attorney's prediction to be the basis for plea withdrawal would elevate the attorney's word over the court's power to impose sentence. This refusal to allow plea withdrawal may also be a practical safeguard against attacks upon an attorney's competence<sup>35</sup> or, conversely, against attorney-client complicity in alleging promises by counsel in order to obtain withdrawal of a plea resulting in an unfavorable sentence. In *Paradiso v. United States*,<sup>36</sup> and *Mascola v. United States*,<sup>37</sup> the Third Cir-

27. *Brady v. United States*, 397 U.S. 742, 748 (1970). In *Brady*, the Court noted that a guilty plea constitutes a waiver of a defendant's right to a trial. As such, it is a waiver of a constitutional right that must be a voluntary, knowing, intelligent act, done with sufficient awareness of the relevant circumstances. *Id.*

28. 397 U.S. 742 (1970).

29. *Id.* at 755, quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958).

30. 420 F.2d 935, 937 (10th Cir. 1970).

31. *McMann v. Richardson*, 397 U.S. 759 (1970).

32. *Swanson v. United States*, 304 F.2d 865 (8th Cir. 1962), *cert. denied*, 371 U.S. 894 (1962).

33. *Criser v. United States*, 319 F.2d 849 (10th Cir. 1963).

34. 397 U.S. at 755, quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958).

35. *Criser v. United States*, 319 F.2d 849, 850 (10th Cir. 1963).

36. 482 F.2d 409 (3d Cir. 1973), *noted in* 19 VILL. L. REV. 335 (1973). In *Paradiso*, the court denied defendants permission to withdraw their pleas when they alleged that their attorney had told them that there was a good probability of receiving concurrent sentences and the record established compliance with rule 11 in accepting guilty pleas. 482 F.2d at 412-13.

37. 469 F.2d 1057 (3d Cir. 1972). In *Mascola*, the court held that there was no "manifest injustice" in not permitting withdrawal of a plea as provided in Federal

cuit applied the *Wellnitz* principle to prohibit the withdrawal of guilty pleas.

A quite different situation is presented when the petitioner alleges that his plea of guilty was induced by promises made by the prosecution. In *Machibroda v. United States*,<sup>38</sup> the Supreme Court held that the petitioner should have been granted a hearing upon this issue because if his allegation had proved to be true, he would have been entitled to relief.<sup>39</sup> The Third Circuit reached a similar conclusion in *Moorhead v. United States*,<sup>40</sup> wherein it held that *Brady* was applicable to the situation where petitioner's sole allegation was that his plea was involuntary because it had been induced by his attorney's representations that there was a "proposition" with the prosecutor for, at least, a light sentence.<sup>41</sup> The *Valenciano*<sup>42</sup> court considered *Moorhead* controlling authority as that case had held that pleas so induced could not be voluntary under federal standards.<sup>43</sup>

It is submitted that the Third Circuit's continuing application of the voluntariness standard is in keeping with the spirit of *Brady* and *Machibroda*, because, in addition to insuring that innocent defendants are not induced to plead guilty by false promises of leniency, this line of cases guards against unscrupulous tactics by prosecutors. The Third Circuit's decisions in *Moorhead* and *Valenciano* place the judge in direct control of plea bargaining in order to guarantee basic fairness for the defendant.

After deciding that *Valenciano* was entitled to a hearing, the court considered the problem of how to avoid the necessity of holding section 2255 hearings in the future. The court implied that in the instant case the sentencing judge had complied with the mandates of rule 11,<sup>44</sup> but noted that compliance did not absolutely foreclose the possibility of later hearings.<sup>45</sup> The court suggested that in order to obviate the necessity

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Rule of Criminal Procedure 32(d), when only erroneous advice from counsel was alleged. *Id.* at 1059. Compare *Castro v. United States*, 396 F.2d 345 (9th Cir. 1968), wherein the court ordered a hearing when the defendant's counsel swore in an affidavit that he had incorrectly predicted sentence, *id.* at 347, and the record of the plea proceedings did not establish that the defendant understood the consequences of his plea. *Id.* at 349.

38. 368 U.S. 487 (1962).

39. *Id.* at 493. In *Machibroda*, the petitioner also alleged that he had been cautioned by the prosecutor not to tell his own attorney about the conversation, thus rendering his counsel's assistance ineffective. *Id.* at 489. For a discussion of *Machibroda*, see Note, *supra* 23, at 872.

40. 456 F.2d 992 (3d Cir. 1972).

41. *Id.* at 995. Accord, *Motley v. United States*, 230 F.2d 110, 112 (5th Cir. 1956) (hearing granted despite United States Attorney's denial of allegation by affidavit). See also *Sanders v. United States*, 373 U.S. 1 (1963) (unless motion and files conclusively show petitioner entitled to no relief, hearing is necessary).

42. 495 F.2d at 586.

43. 456 F.2d at 995.

44. 495 F.2d at 586. The assertion that such an implication was intended is based upon the court's reliance upon *Moorhead*, a case where the requirements of rule 11 had been met. *Id.*

45. *Id.* at 588. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Supreme Court held that a defendant was entitled to plead anew if a district court accepted his guilty plea without fully adhering to the rule 11 procedure. *Id.* at 463-64.

of holding section 2255 hearings, records of future rule 11 proceedings should disclose that (1) the defendant stated that no promise, representation, agreement, or understanding other than those disclosed in open court had been made before his plea was entered, (2) that he had not been required to respond untruthfully in court, and (3) that he understood that he could not contend later that any other agreement had been made.<sup>46</sup> The court, quoting from *Paradiso*, also suggested that the defendant be informed that plea bargaining is specifically approved by the court and that he might negotiate a plea "without the slightest fear of incurring disapproval of the court."<sup>47</sup>

It is submitted that Judge Rosenn was correct in his concurring opinion that the suggestions made by the court will "not significantly aid the courts in avoiding attacks on pleas of guilty allegedly improperly induced,"<sup>48</sup> because the court did not provide an adequate solution for the problem of alleged promises made by the prosecutor. Most significantly, the court did not suggest that either the defendant's counsel or the prosecutor be questioned by the court about the existence and terms of any possible plea bargain. This failure conflicts with Judge Rosenn's suggestion in *Paradiso* that all of the parties involved should be questioned as to the existence of any plea agreement.<sup>49</sup> Such questioning of the attorneys has also been recommended by numerous American Bar Association proposals<sup>50</sup> and by recent decisions in other circuits.<sup>51</sup>

It is submitted that such direct questioning of the attorneys should be implemented in all rule 11 proceedings. A defendant may be hesitant to admit in open court to having made any out-of-court agreement although he may be instructed by the court that plea bargaining is an approved practice. The procedure suggested by the *Valenciano* Court<sup>52</sup> adds little to the actual procedure followed by the judge who passed sentence on the petitioner.<sup>53</sup> The only significant addition was the suggested second

46. 495 F.2d at 587-88.

47. *Id.* at 588, quoting *Paradiso v. United States*, 482 F.2d 409, 413 (3d Cir. 1973).

48. 495 F.2d at 589 (Rosenn, J., concurring).

49. The *Paradiso* Court suggested:

Inquiry should also be made of counsel for the parties as to any plea negotiations. Should inquiry reveal the presence of plea negotiations, counsel for the parties should be required to state plainly the terms of record and the defendant should state of record whether he understands them and concurs.

482 F.2d at 413.

50. ABA STANDARDS, PLEAS OF GUILTY § 1.5 (Approved Draft, 1968) states:

By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is what agreement has been reached.

*Id.* See also ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES §§ 5.3(d)(iii), (f)(iv) (Approved Draft, 1968).

51. *Hilliard v. Beto*, 465 F.2d 829, 832-33 n.11 (5th Cir. 1972), *vacated and remanded for factual hearing*, 494 F.2d 35 (5th Cir. 1974); *Walters v. Harris*, 460 F.2d 988, 993 (4th Cir. 1972).

52. See note 46 and accompanying text *supra*.

53. *Valenciano v. United States*, 471 F.2d 1071, 1074 (9th Cir. 1972). The court noted that the sentencing judge asked the first suggested question. 495 F.2d at 587.

question relating to any possible agreement requiring the defendant to respond untruthfully in court.<sup>54</sup> It is difficult to understand how asking the defendant if he was instructed to deny any plea bargaining could be determinative. The court conceded that the petitioner in the instant case faced a "herculean" burden at an evidentiary hearing because of his negative responses to questions concerning plea bargaining, but also recognized that an inherent part of any plea agreement might have been that the defendant would agree to respond in such a manner.<sup>55</sup> If, as the court noted, a defendant can be told to lie in response to the first question, he can also be instructed to answer negatively to the second. Even if not so instructed, few defendants would admit to having been untruthful in court.<sup>56</sup>

Moreover, it is submitted that taking a moment to place statements of both attorneys about any plea bargain into the record would do much to obviate the necessity for any post-sentencing hearings. These statements might well be the major evidence sought in such hearings, and it would seem prudent to take them while memories are fresh. Avoidance of these hearings with their consequential administrative burdens, the danger of prisoner escape if the defendant is allowed to appear,<sup>57</sup> and a possibly antagonistic attorney-client confrontation is highly desirable. Unfortunately, the instant court seems to have failed to provide an effective means to accomplish this objective.

In addition to the issue of the aborted plea agreement, there existed another ground upon which this case could have been decided. In his concurring opinion, Judge Rosenn stated that the case should have been remanded to the district court with instructions to vacate the judgment and to allow the petitioner to plead anew to the indictments.<sup>58</sup> In reaching this conclusion, Judge Rosenn relied upon *Roberts v. United States*,<sup>59</sup> wherein the Third Circuit had held that under rule 11, a special parole term is a consequence of a guilty plea which must be explained to the

54. See note 46 and accompanying text *supra*. Suggested question number three would not be binding, as the court admitted that the "disclaimers may not obviate the necessity of subsequent . . . hearings in all cases . . ." 495 F.2d at 588.

55. 495 F.2d at 587. The court quoted *Moorhead*:

"In the posture of the case before us there are several possibilities. Moorhead may be lying about what his attorneys told him. His attorneys may have told him what he alleges, and they may have been lying. His attorneys may have told him what he alleges and may in fact have had some arrangement with the prosecuting authorities. . . . [N]one of . . . [these] possibilities are conclusively negated by the files and records of the case. They depend upon matters outside the record."

*Id.*, quoting *Moorhead v. United States*, 456 F.2d 992, 995 (3d Cir. 1972).

56. Of course, this latter problem can be mitigated by the court's asking the second question before the first. However, a defendant might still be unwilling to be truthful if he thought he might thereby antagonize the attorney who instructed him to lie, especially if that attorney is the prosecutor.

57. A prisoner's presence is not required at the hearing. 28 U.S.C. § 2255 (1970).

58. 495 F.2d at 588 (Rosenn, J., concurring).

59. 491 F.2d 1236 (3d Cir. 1974). *Roberts*, a heroin distributor had been indicted and sentenced under the same statute as Valenciano. *Id.* at 1237. See notes 1 & 6 *supra*.

defendant before his plea may be accepted.<sup>60</sup> The sentencing judge had failed to warn Valenciano of the special parole term required by his plea,<sup>61</sup> and the Government did not contend that he had been warned of this possibility at any other time.<sup>62</sup> Therefore, *Roberts* appears to be controlling, and the majority need never have reached the plea bargain issue because under *Roberts*, Valenciano's guilty plea should have been set aside without an evidentiary hearing to determine its voluntariness.<sup>63</sup>

The *Valenciano* court was upon safe ground in reaffirming the distinction between an erroneous prediction of sentence by the defendant's own counsel which cannot form the basis for the withdrawal of a guilty plea, and an allegation of a misrepresentation made by the prosecution which, if true, would render the defendant's plea involuntary under federal standards. However, its additional suggestions for avoiding the evidentiary hearings required by section 2255, it is submitted, may not produce the ends which the court desired. The court should have stressed the need to question defendant's counsel and the prosecution directly concerning any possible plea bargain. However, the mere fact that the court required an evidentiary hearing in this case may make district courts more careful in future rule 11 proceedings to ensure that the record discloses that the defendant's plea was made with full and accurate awareness of its consequences.

*Patricia Mattern*

CRIMINAL PROCEDURE — INSANITY DEFENSE — JURY INSTRUCTION  
ALLOWING JURY TO DETERMINE WHETHER DEFENDANT'S EVIDENCE  
WAS SUFFICIENT TO RAISE ISSUE OF MENTAL CAPACITY CONSTITUTES  
REVERSIBLE ERROR.

*Virgin Islands v. Bellott* (1974)

At defendant's trial for first degree murder he offered the expert testimony of a clinical psychologist and a psychiatrist<sup>1</sup> to demonstrate that the offense for which he was indicted was a consequence of a mental illness from which he was suffering at the time of the offense.<sup>2</sup> To rebut

60. 491 F.2d at 1236. A special parole term, as distinguished from ordinary parole, imposes restrictions upon freedom in excess of the full term of sentence, and carries with it the possibility of additional imprisonment for its violation. *Id.* at 1238.

61. See notes 6 & 16 *supra*.

62. 495 F.2d at 588.

63. *Id.* Interestingly enough, the majority also suggested that the district court "consider the possible application of *Roberts*." *Id.*

1. *Virgin Islands v. Bellott*, 495 F.2d 1393, 1394 (3d Cir. 1974).

2. *Id.* In *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961), the Third Circuit rejected the M'Naghten Rules for criminal responsibility and adopted a modified version of the American Law Institute's test for criminal responsibility. Compare *Moore v. Panova*, 401 F.2d 1001 (9th Cir. 1968), with *United States v. Currens*, 290 F.2d at 774 & n.32.

this evidence, the prosecution relied upon the testimony of lay witnesses who had observed the defendant shortly before and after the offense,<sup>3</sup> and upon damaging cross-examination of defendant's experts which raised doubts as to the validity of their testimony.<sup>4</sup> The defendant requested that the jury be instructed that the issue of mental capacity had been sufficiently raised by the evidence to cause the burden of proving defendant's sanity beyond a reasonable doubt to shift<sup>5</sup> to the prosecution as a matter of law.<sup>6</sup> The district court rejected this charge and instructed the jury that it was within their province as finders of fact to determine whether the evidence adduced at trial sufficiently raised the issue of defendant's mental capacity, and if the jury so found then the prosecution would have the burden of proving defendant's sanity beyond a reasonable doubt.<sup>7</sup> The jury found the defendant guilty of first degree murder and he appealed. The Third Circuit reversed and remanded for a new trial, *holding* that the trial court, and not the jury, must determine as a matter of law whether the evidence presented was sufficient to raise the issue of

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3. 495 F.2d at 1394.

4. *Id.* at 1397-98.

5. The term "burden of proof" is often loosely used to refer to either the burden of establishing the existence of a given proposition (the risk of nonpersuasion) or the burden of going forward with the evidence in order to raise an issue or rebut an adverse presumption (the risk of nonproduction). See generally 9 J. WIGMORE, EVIDENCE §§ 2485, 2487 (3d ed. 1940).

When the term is used in the first sense it can never properly be said to shift between the parties to a criminal litigation because the prosecution must bear the burden of proving all the elements of the offense beyond a reasonable doubt. However, when used in the second sense, the burden of proof may shift, at various times, between the parties, especially when a presumption such as the one in the instant case places upon one party the initial burden of going forward with evidence in rebuttal, and that evidence is introduced. See notes 37-39 and accompanying text *infra*. It is to this second sense which courts refer when they state that the burden of proof shifts to the prosecution upon defendant's introduction of evidence tending to rebut the initial presumption of sanity. See note 11 and accompanying text *infra*.

6. 495 F.2d at 1394-95.

7. *Id.* The district court's charge, in pertinent part, was as follows:

Now, Dr. Hogan has testified that . . . the man is mentally ill and that . . . the man was mentally ill [at the time of the offense] and that . . . the acts with which this man is charged were done by him in consequence or as a consequence of that mental [sic] illness. This is for you to determine. Without encroaching on your province as finders of fact and without suggesting that you find that to be the fact, I do suggest only that this is a sufficient quantum of evidence which you might regard as causing the burden of proof to shift to the Government. It may or may not be enough to warrant a verdict of not guilty by reason of mental illness. *It may or may not be enough even to cause the burden to shift when you assess it*, but in commenting on the evidence, as is my right to do and as I have said you may reject, but by way of suggestion to you I think it at least satisfies the requirement that the burden should shift.

. . . To sum up then that charge . . . *if you find that the testimony of the experts called by the defense sufficiently raises the question of the defendant's soundness*, then the burden shifts to the prosecution and you must then search the evidence to see whether the prosecution has satisfied you beyond a reasonable doubt that the defendant had the mental capacity to commit the offense charged

....

defendant's mental capacity, and if it was so, the jury must then be instructed that the prosecution must bear the burden of proving defendant's sanity beyond a reasonable doubt. Therefore, the district court's jury charge regarding mental capacity was reversible error because it placed upon the defendant the threshold burden of persuading the jury that he had raised the issue of mental capacity. *Virgin Islands v. Bellott*, 495 F.2d 1393 (3d Cir. 1974).

The primary question raised by the appeal<sup>8</sup> was one of first impression in the Third Circuit.<sup>9</sup> In all United States jurisdictions every person is initially presumed to be sane.<sup>10</sup> Thus, there is no burden upon the prosecution to adduce any evidence of sanity unless this presumption is rebutted and the issue of defendant's sanity thereby raised by evidence to the contrary. Once this presumption of sanity is rebutted, there remains the question of which party should bear the burden of proof of mental capacity. The resolution of this issue, in turn, is often dependent upon the difficult question of whether sanity is necessary to the formation of criminal intent, the traditional mens rea required for criminal culpability. If it is, then sanity, in effect, becomes an element of the crime which the prosecution must prove beyond a reasonable doubt. If it is not, insanity is an affirmative defense or avoidance and the defendant must bear the burden of its proof.<sup>11</sup>

8. In addition to the primary issue addressed in this note, the court disposed of two collateral issues at the conclusion of its opinion. First, the court rejected the defendant's contention that he was entitled to a directed verdict of acquittal because he had produced expert testimony on mental capacity whereas the Government had not. The court noted that there had been both considerable lay testimony suggesting sanity at the time of the offense, and damaging cross-examination of defendant's experts which cast doubt upon the basis of their testimony. Hence the court implied that a jury could have concluded reasonably that the defendant was sane beyond a reasonable doubt. 495 F.2d at 1397-98. Compare *Brown v. United States*, 351 F.2d 473 (5th Cir. 1965), and *Duskey v. United States*, 295 F.2d 743 (8th Cir. 1961), cert. denied, 368 U.S. 998 (1962), with *Brock v. United States*, 387 F.2d 254 (5th Cir. 1967); *United States v. Westerhausen*, 283 F.2d 844 (7th Cir. 1960); and *McKenzie v. United States*, 266 F.2d 524 (10th Cir. 1959).

Second, the court declined to address the issue of whether the insanity test announced in *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961), had any effect upon the rule that lay testimony on the issue of mental capacity offered by the prosecution may satisfy its burden of proof when weighed against contrary expert testimony. 495 F.2d at 1397.

9. See note 25 *infra*.

10. H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 214 (1954) [hereinafter cited as WEIHOFEN].

11. In approximately half of the state courts the prosecution is required to prove the defendant's sanity beyond a reasonable doubt once the issue of mental capacity has been sufficiently raised, while the remainder require that the defendant prove his alleged insanity by a preponderance of the evidence. See WEIHOFEN, *supra* note 10, at 241. See generally Annot., 17 A.L.R.3d 146 (1968). The former position adopts the view that sanity is a prerequisite to the formation of the required mens rea. See, e.g., *Bradford v. State*, 234 Md. 505, 512, 200 A.2d 150, 154 (1964); *Commonwealth v. Vogel*, 440 Pa. 1, 14-17, 268 A.2d 89, 90-91 (1970) (Roberts J., opinion in support of order). The latter position is generally predicated upon the notion that insanity is not itself an element of mens rea, but rather is an affirmative defense which must be pleaded and proved by the defendant. See, e.g., *State v. Quigley*, 26 R.I. 263, 269-76, 58 A.2d 907, 909 (1963); *Commonwealth v. Vogel*, 440 Pa. 1, 3-14, 268 A.2d 89, 91-96



Since 1895, when the Supreme Court of the United States decided *Davis v. United States*,<sup>12</sup> federal courts have been bound by the rule that upon a showing by either party of some evidence of defendant's insanity, the prosecution must assume the burden of proving defendant's sanity beyond a reasonable doubt.<sup>13</sup> The Supreme Court has, upon several occasions,<sup>14</sup> recognized and reaffirmed this position, at least insofar as it applies to federal courts.<sup>15</sup> All of the circuit courts which have faced the broad issue of which party must bear the burden of proof on mental capacity have applied the *Davis* rule without much discussion.<sup>16</sup> Actually, the basic

(1970) (Jones, J., opinion in support of order). This latter view apparently had its origin in the famous Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843), where Lord Chief Justice Tindal, responding to questions of law put to the English Judges by the House of Lords, said that every man is presumed sane *until the contrary is proved* and that to establish the defense of insanity it must be "*clearly proved*" that at the time of the offense the defendant was insane. *Id.* at 722 (emphasis added).

For a critical analysis of state decisions holding that the burden of proving mental capacity is the defendant's, see Comment, *Insanity — The Burden of Proof*, 30 LA. L. REV. 117 (1969); Comment, *Some Evidentiary Aspects of the Insanity Defense in Pennsylvania*, 45 TEMP. L.Q. 63 (1971); Note, *The Insanity Defense in Missouri — Guilt by a Preponderance of Evidence*, 40 U. MO. K.C. L. REV. 240 (1971); 75 DICK. L. REV. 503 (1971); 9 DUQ. L. REV. 320 (1970); 15 MD. L. REV. 157 (1955).

12. 160 U.S. 469 (1895).

13. In *Davis*, the Supreme Court considered the following jury charge:

[T]he law presumes every person . . . to be of sane mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is interposed as a defense, the fact of the existence of such insanity at the time of the commission of the offense charged must be established by the evidence to the reasonable satisfaction of a jury, *and the burden of proof of the insanity rests with the defendant.* . . .

... When you start into a trial of a case, as I have already told you, you start in with the presumption of sanity. Then comes in the responsibility resting upon the defendant to show his condition; to show his irresponsibility under the law. He is required to show that — to your reasonable satisfaction, I say, to your reasonable satisfaction — that it is a state of case where he is excusable for the act.

*Id.* at 477-78 (emphasis added).

Reversing the conviction, a unanimous Court held that, in federal prosecutions, the burden of proof of mental capacity never rests with the defendant but rather, where the issue is raised, the prosecution must prove defendant's sanity beyond a reasonable doubt. *Id.* The real basis of the decision was the Court's view that sanity is a necessary element of criminal intent — *mens rea* — and must be proven beyond a reasonable doubt, as must all other elements of a particular offense. *Id.* at 484-85. See note 11 and accompanying text *supra*.

14. *E.g.*, *Lynch v. Overholser*, 369 U.S. 705, 713 (1962); *Matheson v. United States*, 227 U.S. 540, 543 (1913); *Battle v. United States*, 209 U.S. 36, 38 (1908); *Hotema v. United States*, 186 U.S. 413, 417-18 (1902).

15. *Davis* did not involve the Court's formulation of a constitutionally mandated rule and is not, therefore, applicable to state prosecutions. See *Leland v. Oregon*, 343 U.S. 790, 797 (1952) (Oregon statute requiring defendant to prove his insanity beyond reasonable doubt held constitutional).

16. *E.g.*, *Isaac v. United States*, 284 F.2d 168, 169-70 (D.C. Cir. 1960); *Rivers v. United States*, 270 F.2d 435, 439-40 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960); *Howard v. United States*, 232 F.2d 274, 276 (5th Cir. 1956). For a more extensive compilation of cases which generally support the *Davis* rule, see Annot.,

meaning of *Davis* has never been seriously questioned by the federal courts; rather, the sub-issues of (1) what quantum of evidence of insanity is necessary to raise the issue for the jury's consideration;<sup>17</sup> (2) the relationship of opposing lay and expert testimony upon insanity, and their respective evidential weights as to the issue of mental capacity;<sup>18</sup> and (3) the treatment of the presumption of sanity as evidence once it has been rebutted,<sup>19</sup> have been the subjects of repeated consideration by the circuit courts.

Other federal cases, similar to *Bellott*, wherein the trial judge allowed the jury to determine whether the defendant had adduced sufficient evidence to raise the issue of mental capacity when it was clear that the defendant had, as a matter of law, adduced the quantum of evidence re-

17. In *Davis* the Court said, "Where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce *some evidence* that will impair or weaken the force of the legal presumption in favor of sanity." 160 U.S. at 486-87 (emphasis added).

Although the lower federal courts have differed in translating "some evidence" into more specific standards, it is unclear whether the application of these differing standard would produce differing results, given the same facts. See, e.g., *United States v. Currier*, 405 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969) (some evidence sufficient to raise a doubt of sanity); *Evatt v. United States*, 382 F.2d 424, 428 (9th Cir. 1967) (slight evidence); *McDonald v. United States*, 312 F.2d 847, 849 (D.C. Cir. 1962) (more than a scintilla, yet not so substantial as to require a directed verdict of acquittal if left uncontroverted); *Phillips v. United States*, 311 F.2d 204, 206 (10th Cir. 1962) (any relevant evidence); *Hall v. United States*, 295 F.2d 20, 28 (4th Cir. 1961) (slight evidence but not enough to create a reasonable doubt); *United States v. Currens*, 290 F.2d 751, 761 (3d Cir. 1961) (enough to provoke inquiry into mental capacity); *Pollard v. United States*, 282 F.2d 450, 457 (6th Cir. 1960) (evidence sufficient to create reasonable doubt).

The difficulty inherent in establishing a standard to measure the sufficiency of evidence necessary to raise the issue of mental capacity has been recognized in the various circuits. Moreover, a reading of the cases attempting to apply such standards reveals their dubious face value. In *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951), the court said, with reference to the issue of mental capacity, "Any attempt to formulate a quantitative measure of the amount of evidence necessary to raise an issue can produce no more than an illusory definiteness." *Id.* at 615.

This does not mean that the circuit courts should abandon these attempts to give the district courts some direction as to when the issue of mental capacity is sufficiently raised to allow jury consideration. It is merely suggested that the standards can be only vague at best, and that the district courts' assessment of the evidence tending to show the defendant's insanity is very much open to review. Because of the negligible face value of the articulated standards, it is necessary to examine carefully the cases applying these criteria in order to understand their meanings.

18. See note 8 *supra*, and *Brock v. United States*, 387 F.2d 254, 257 n.6-8 (5th Cir. 1967), for cases dealing with this issue, which is raised when the defendant has introduced expert testimony tending to show his insanity at the time of the offense, while the prosecution has relied upon lay testimony in order to prove defendant's sanity beyond a reasonable doubt.

19. Compare *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971), with *Keys v. United States*, 346 F.2d 824 (D.C. Cir.), *cert. denied*, 382 U.S. 869 (1965). For a discussion of this issue in the Third Circuit see notes 33-44 and accompanying text *infra*.

quired to raise the issue,<sup>20</sup> have also resulted in convictions being reversed.<sup>21</sup> There appear to be no opinions reaching a contrary result. In *Doyle v. United States*,<sup>22</sup> the Ninth Circuit considered a jury instruction which, in effect, allowed the jury to determine whether the issue of mental capacity had been raised.<sup>23</sup> The *Doyle* court expressed the rationale behind its holding and other federal decisions on this issue, when it stated:

The vice in the instruction given here is that it is impossible to ascertain what the jury did pursuant to it. The jury may well have decided that the defendant had not fulfilled the burden of "making some showing of insanity or mental irresponsibility." Hence the jury under that instruction may well have concluded that the defendant's insanity did not become an "element of the crime," and that there was therefore no burden on the Government to prove sanity.<sup>24</sup>

Operating with the foregoing material as background and in the absence of its own precedent upon the precise issue before it,<sup>25</sup> the *Bellott*

20. See note 17 and accompanying text *supra*. Note that the district court's jury charge in the instant case, in commenting upon the evidence, expressly found that, in its opinion, the defendant's evidence on mental capacity was sufficient to raise that issue. 495 F.2d at 1395. See note 7 *supra*.

21. *United States v. Arroyave*, 465 F.2d 962 (9th Cir. 1972); *Doyle v. United States*, 366 F.2d 394 (9th Cir. 1966); *Davis v. United States*, 364 F.2d 572 (10th Cir. 1966); *Otney v. United States*, 340 F.2d 696 (10th Cir. 1965); *Fitts v. United States*, 284 F.2d 108 (10th Cir. 1960). Cf. *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971); *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951). It is not clear why the instant court failed to rely upon or, indeed, discuss any of these cases but *Otney* in reaching its decision. The court read *Otney* — perhaps too broadly — as holding that a district court in charging the jury may not so much as refer to the presumption of sanity. The court said this holding went beyond what was required by *Davis*. 495 F.2d at 1397.

22. 366 F.2d 394 (9th Cir. 1966).

23. The *Doyle* court considered a jury charge which provided:

Under the law applicable to the defendant's plea of insanity and mental irresponsibility every man is presumed to be sane and mentally responsible, and to intend the natural and usual consequences of his own acts. The government need not prove insanity [sic] in the first instance. The defendant has the burden, in the first instance, of making some showing of insanity or mental irresponsibility. However, when the defendant introduces some evidence to raise the issue of insanity his sanity at the time of the commission of the offense becomes an element of the crime which, like all other elements of the crime, must be proved by the government beyond a reasonable doubt. The rule is that if, from the whole evidence, the jury has a reasonable doubt as to the defendant's mental competency or mental responsibility the accused is entitled to an acquittal on the grounds of such insanity or mental irresponsibility.

*Id.* at 400.

24. *Id.* (quoting trial court's charge).

25. In *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961), the *Davis* rule, with respect to the burden of proof on mental capacity, was acknowledged but not passed upon on appeal. *Id.* at 761. It is important to note that the *Currens* court did not view *Davis* as either approving or disapproving the M'Naghten Rules for insanity. *Id.* at 767-68. Therefore, as the *Bellott* court pointed out, "[*Currens* cast] no doubt whatever upon the continued validity of *Davis* insofar as that case dealt with the burden of proof." 495 F.2d at 1396.

Likewise, in *United States v. Lutz*, 420 F.2d 414 (3d Cir.), *cert. denied*, 398 U.S. 911 (1970), the Third Circuit again embraced the *Davis* rule, but noted that the applicability of the rule was not challenged by the appeal. *Id.* at 415. Hence, in

court relied heavily upon *Davis*. The court stated that the district court's jury instructions placed upon the defendant a threshold burden of persuading the jury that he had produced sufficient evidence of insanity to raise the issue, before the jury could decide whether the prosecution had met its burden of proving defendant's sanity beyond a reasonable doubt.<sup>26</sup> Affording *Davis* its broadest reading, the court concluded that it was error for a trial court's charge as to mental capacity to place any burden of proof upon the defendant.<sup>27</sup> Therefore, the court found that the district court had erred in concluding that the general presumption of sanity itself imposed a burden of persuasion upon the defendant after evidence sufficient to raise the issue of mental capacity had been presented.<sup>28</sup>

It is submitted that a more apt description of the district court's error is that it held that the jury was to determine whether the evidence presented was sufficient to create a jury question as to mental capacity, instead of making the sufficiency of the evidence a question of law for the court's determination.<sup>29</sup> It seems apparent that the district court understood that initially the prosecution had no burden of proof regarding the defendant's mental capacity, and that if the evidence sufficiently raised that issue, the prosecution would have to prove defendant's sanity at the time of the offense beyond a reasonable doubt.<sup>30</sup> The district court erred in not assuming the responsibility for determining when the issue arose and thereafter instructing the jury in accordance with this determination.

The *Bellott* court found additional support for its decision in a trilogy of prior Third Circuit opinions dealing with jury instructions allocating

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its instant opinion, the court conceded that the Third Circuit had never "considered the precise issue here presented." 495 F.2d at 1396. However, the court failed to state precisely what it perceived the issue to be. Broadly speaking, the issue would appear to have been whether the district court's charge relating to insanity may place any part of the burden of proof upon the defendant. Alternatively, the issue may have been more narrowly framed in terms of whether it is a function of the court, or of the jury, to determine if the evidence of defendant's insanity is sufficient to raise the issue of mental capacity. The instant court seems to have adopted the former view. See note 29 and accompanying text *infra*.

26. 495 F.2d at 1397.

27. *Id.* at 1395. Although there is no burden of *persuasion* upon a defendant who pleads the defense of insanity, there is a burden of initially *producing* evidence of insanity, where no other evidence of insanity has been presented. 160 U.S. at 486. See generally 9 J. WIGMORE, *supra* note 5, §§ 2487, 2501, and note 5 *supra*.

28. 495 F.2d at 1396. See note 5 *supra*.

29. These differing views of the district court's error are actually two sides of the same coin. As noted earlier, there is a presumption of sanity, which does place a burden upon the defendant in the absence of any evidence of insanity. See note 27 *supra*. However, it is a production burden and not a persuasion burden. The latter addresses itself to the jury, while the former involves determinations by the trial court of whether as a matter of law there is sufficient evidence upon a particular factual issue as to require the jury's consideration. Hence it is error to allow a jury to determine whether sufficient evidence has been produced to raise an issue, since this is the proper function of the court. See generally 9 J. WIGMORE, *supra* note 5, §§ 2487, 2549.

30. See note 7 *supra*.

the burden of proof in what the court considered analogous situations.<sup>31</sup> It is evident from its citation of these cases that the *Bellott* court was focusing primarily upon the prejudicial effect of a jury charge which potentially placed the burden of persuasion upon a criminal defendant. With respect to mental capacity, *Davis* clearly proscribed any such instruction.<sup>32</sup> While it concluded that the district court's charge upon mental capacity was error which required a new trial, the instant court also relied upon *Davis*<sup>33</sup> to support its suggestion that a trial court

should also instruct the jury that there is a presumption of sanity which it may take into account along with all the evidence in the case in determining whether the Government has proved beyond a reasonable doubt that the offense was not the consequence of a mental illness.<sup>34</sup>

It is true that there is language in *Davis* within which would fall a jury instruction that the presumption of sanity still retains some evidentiary weight after it has been rebutted.<sup>35</sup> Yet some circuits which have considered

31. 495 F.2d 1396-97. In the first of these cases, *United States v. Allegrucci*, 258 F.2d 70 (3d Cir. 1958), the Third Circuit held that a jury instruction to the effect that unexplained possession of recently stolen goods placed a burden upon those holding the goods to explain their possession, constituted reversible error. *Id.* at 73. The *Allegrucci* court emphasized that the effect of such a charge was to impose upon a defendant the burden of proving his innocence. Put another way, the defendant was being called upon to disprove an element of the offense of possession of stolen goods, to wit, knowledge of theft. *Id.* at 74. The *Allegrucci* court cited cases from other circuits in which similar instructions about the raising of a *presumption* of guilty knowledge were held to be prejudicial error. *Id.* The court posited that the *burden* instructions in question were more onerous to a defendant than the *presumption* instructions other circuits had held invalid, and thus were reversible error. *Id.*

In *United States v. Marcus*, 166 F.2d 497 (3d Cir. 1948), followed in *United States v. Barrasso*, 267 F.2d 908, 910-11 (3d Cir. 1959), the other cases cited in *Bellott*, the Third Circuit embraced the general rule that once evidence of alibi is offered, the jury must be instructed that the "government's burden of proof covers the defense of alibi, as well as all other phases of the case." 166 F.2d at 504.

32. In *Davis*, the Supreme Court said:

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime.

160 U.S. at 487.

33. 495 F.2d at 1397.

34. *Id.*

35. The *Davis* court stated:

Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond a reasonable doubt. If the whole evidence, *including that supplied by the presumption of sanity*, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged.

this question have reached the opposite conclusion.<sup>36</sup> The presumption of sanity is based upon the statistically verifiable fact that most people are sane.<sup>37</sup> Such a presumption is permitted largely, if not solely, because of the procedural convenience it affords in the great majority of criminal trials where mental capacity is not at issue.<sup>38</sup> The presumption, if unchallenged, "thus supplies in the first instance the required proof of capacity to commit crime."<sup>39</sup> If this were not so, the government would be put to the unnecessarily burdensome task of proving a defendant's sanity by affirmative evidence at every trial, regardless of whether the defendant ever considered pleading insanity as a defense.

However, once the presumption of sanity is rebutted by sufficient evidence to the contrary, it does not follow that it should retain any probative weight.<sup>40</sup> The Supreme Court in *Davis* expressly stated that it was

36. *United States v. Lawrance*, 480 F.2d 688, 693 (5th Cir. 1973); *United States v. Skinner*, 437 F.2d 164, 166 (5th Cir. 1971); *United States v. Bohle*, 445 F.2d 54, 70 (7th Cir. 1971). *Contra*, *Keys v. United States*, 346 F.2d 824, 826 (D.C. Cir.), *cert. denied*, 382 U.S. 869 (1965). See generally J. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* §§ 314, 336 (1898); WEIHOFEN, *supra* note 10, at 216 *et seq.*; 9 J. WIGMORE, *supra* note 5, § 2491; Annot., 5 A.L.R.3d 19 (1966).

37. See 160 U.S. at 486; WEIHOFEN, *supra* note 10, at 214.

38. See 160 U.S. at 486; C. McCORMICK, *LAW OF EVIDENCE* § 309 (1st ed. 1954); Morgan, *Further Observations On Presumptions*, 16 S. CAL. L. REV. 245, 251 (1943).

39. 160 U.S. at 486.

40. Although there are cases approving instructions that the presumption of sanity continues as evidence of sanity even after it has been controverted, and thus may be considered by the jury along with the other evidence on mental capacity (see note 36 and accompanying text *supra*), there are compelling reasons to hold otherwise:

First, as noted earlier, the predominant basis for the presumption of sanity in criminal actions is the procedural convenience it affords. See notes 38-39 and accompanying text *supra*. The presumption, in effect, operates to compel the defendant to introduce evidence of insanity if he wants the issue to be considered by the jury. Once the defendant has done this, the presumption has served its purpose and should be considered irrelevant to the case. A presumption may be constructed by law to accomplish the purpose of eliciting evidence, but it does not follow that the controverted presumption should thereafter be treated as evidence.

Second, the presumption of sanity is based upon the statistically verifiable fact that most people are sane, and therefore it loses this justification for its presence when the focus shifts from the general populace to one particular defendant whose sanity is then, by definition, at issue. As soon as there is evidence of the particular individual's mental condition, it becomes illogical to speak of such evidence being outweighed or negated in part by a statistical generalization. Evidence of insanity should be negated by affirmatively adduced, contradictory evidence. A contrary conclusion would create the possibility that a defendant's offer of evidence could be rejected by the jury upon the basis of the statistical generalization alone, should the prosecution choose to rely upon that as its evidence and the trial court hold the jury's decision based, therefore, upon *some* evidence.

Third, instructing a jury that they may take into consideration as probative evidence the presumption of sanity is tantamount to asking them to weigh a rule of law against factual evidence. It is impossible to discern how much evidentiary weight a jury may allocate to this presumption. It is, therefore, quite possible for a jury to give it great weight, and it might lead them to evaluate the defendant's evidence in terms of whether or not this presumption has been overcome. The notion that the presumption of sanity controls until it is overcome by the defendant's evidence is precisely what was sought to be eliminated in *Davis*, relied upon so heavily by the *Ellison* court. In this respect, the *Ellison* court arguably is internally inconsistent. On the one hand it purported to protect the defendant from any burden of persuasion

unwilling to allow a jury to convict where there was equally balanced evidence regarding mental capacity.<sup>41</sup> A rule which allowed a jury to tip the scales of equally balanced evidence by using a debilitated presumption would vitiate the spirit, if not the letter, of *Davis*. It is submitted that the *Davis* language which lends support to the notion that the presumption of sanity retains some evidentiary weight after it has been rebutted should not be treated as binding, because the specific issue was not raised in *Davis* and did not receive that Court's full consideration.<sup>42</sup> Affording evidentiary weight to the presumption of sanity once it has been rebutted places a burden of proof regarding this issue upon the defendant after he has already sufficiently raised the issue of his sanity by extrinsic evidence.<sup>43</sup> As the *Bellott* court made clear, this is precisely what *Davis* proscribed.<sup>44</sup>

The absence of any in-depth analysis of the primary issue by the *Bellott* court, induced by the relative simplicity of that issue and a strong Supreme Court mandate, makes it difficult to assess the breadth of the instant decision. A narrow reading of *Bellott* compels district courts in criminal actions to make a preliminary decision as to whether the evidence adduced has sufficiently raised the issue of mental capacity to require the

upon the issue of mental capacity by positively placing that burden upon the prosecution, once the issue was raised. However, the benefits of that protection are, potentially, withdrawn by allowing an instruction to the jury that the presumption of sanity continues as evidence of sanity even after its rebuttal.

Moreover, when the case goes to the jury, after the presumption of sanity has been rebutted, the jury is at liberty to give any probative force they think fit to the fact that this defendant is human and that most humans are sane. While this may be an inevitable consideration of the jury it should not be given additional weight because of an instruction by the court to consider the presumption of sanity as evidence. In other words, it is not necessary and, indeed, is possibly prejudicial to bring to the jury's attention in any way the existence of a legal presumption of sanity.

For cases and commentary dealing generally with the effect of presumptions as evidence where controverting proof is introduced, see Annot., 5 A.L.R.3d 19 (1966).

41. 160 U.S. at 484. It is assumed that Mr. Justice Harlan, speaking for the *Davis* Court, in alluding to equally balanced evidence, was referred to evidence as it is traditionally perceived — the presentation of testimony and exhibits to a jury in an attempt to persuade them that a fact exists or does not exist — and not as something which is the result, in part, of a legal presumption.

42. See note 13 *supra*. The concept that the language relied upon by the *Bellott* court is gratuitous is buttressed by the fact that the Supreme Court placed emphasis upon the theory that the presumption operated merely as a procedural convenience. 160 U.S. at 486. Additionally, the Court rejected the doctrine that where the evidence of mental capacity is equally balanced the jury can convict. *Id.* at 484. The Court stated that the presumption of sanity "is liable to be overcome, or to be so far impaired, in a particular case that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life." *Id.* at 486 (emphasis added). The conclusion that the presumption of sanity cannot operate as sufficient evidence for a jury's verdict, where the evidence is equally balanced, would seem to indicate that its premise was that such a presumption can never be evidence. Thus, the language in *Davis* supporting the notion that the presumption of sanity continues as evidence after its rebuttal, is not only dicta but is also inconsistent with the *Davis* holding.

43. See note 40 *supra*.

44. 495 F.2d at 1396.

jury's consideration.<sup>45</sup> A broader reading could warn the district courts that, on appeal, their jury instructions will be closely scrutinized for language which might be interpreted as placing a burden of persuasion upon a criminal defendant.

It is submitted that the court's advice as to instructions on the presumption of sanity as evidence was premature, if not injudicious, as the issue was one which did not have to be resolved. It is further submitted that despite the language of *Davis* and the *Bellott* court's dictum, a district court which, having preliminarily determined that the issue of mental capacity is a proper subject for the jury's consideration, proceeds to instruct the jury that the presumption of sanity may be afforded evidentiary weight, will run a significant risk of reversal upon appeal and full argument of the issue.<sup>46</sup>

The court sought to protect criminal defendants from instructions which potentially placed upon them a burden of proof, and made it clear that where the issue of mental capacity is raised as a matter of law, the prosecution must prove defendant's sanity beyond a reasonable doubt. This is an extremely difficult burden of proof for the prosecution successfully to shoulder as it entails proving, to a high degree of certainty, the existence of a particular mental state at a date in the past. It is suggested that the *Bellott* court attempted to lighten this onerous burden by allowing the prosecution to rely, in part, upon the presumption of sanity as evidence, even after its rebuttal. This allowance is arguably gratuitous because the presumption of sanity was not mentioned in the district court's jury instructions, and the issue of the proper role of the presumption of sanity was not raised on appeal. Thus, there appears to have been no need for the court to make prophylactic suggestions to the district courts on such an important issue.

The Third Circuit has forcefully addressed itself to the interrelationship of the judge and jury with respect to the burden of proof of mental capacity in criminal actions. Although the court engaged in no searching analysis of its own, choosing rather to rely heavily upon the *Davis* case, it is submitted that its result reflects the functional balance which must be effected to fairly assess a criminal defendant's mental capacity.

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45. The *Bellott* court did not address itself specifically to the issue of what quantum of evidence is necessary to raise the issue of mental capacity for the jury's consideration since that question was not posed on appeal. It appears that defendant's substantial expert testimony at trial, tending to show defendant's insanity as defined in *Currens*, would have passed muster under any of the tests employed by the various circuit courts, had the evidence been challenged by the government as insufficient to raise the issue. See note 17 and accompanying text *supra*. Additionally, the district court, in its charge, specifically stated that defendant's evidence of insanity, in its opinion, was sufficient to raise the issue of mental capacity — although it allowed the jury to make this determination. 495 F.2d at 1395.